CORNELL LAW REVIEW

Volume 79 | March 1994 | Number 3

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COLLOQUY

RELIGION AND RACE UNDER THE CONSTITUTION: SIMILARITIES AND DIFFERENCES

Jesse H. Choper†

There is a morally compelling and constitutionally powerful tradition in the United States against treating people differently because of either their race or their religious beliefs. Nevertheless, the Supreme Court has employed criteria under the Religion Clauses of the First Amendment[1] for reviewing government action dealing with religion in an approach that varies considerably from the one it has used for race under the Equal Protection Clause of the Fourteenth Amendment.[2] The object of this Article, which focuses on the *purpose* and the *effect* of state regulations that either *favor* or *prejudice* persons or groups on account of race or religion, is mainly to outline an analysis of the Religion Clauses, and secondarily to contrast that analysis with the doctrines that the Court has developed under the Equal Protection Clause.

I
PURPOSE

A. Intentional Prejudice

1. *Similarities Between Race and Religion*

There is a powerful resemblance between the government singling out persons for imposition of adverse consequences because of their skin color[3] and because of or their ideological beliefs. This likeness calls for analogous handling under the Constitution. Perhaps the strongest justification for strict judicial scrutiny of any official attempt to accord persons less than equal respect and dignity either because of their religious beliefs or race rests in the fact that throughout history

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1 U.S. CONST. amend I.

2 U.S. CONST. amend. XIV § 1.

3 Throughout this article, I include ethnicity within the same protected category as race.

such efforts have been similarly rooted in "hate, prejudice, vengeance, [and] hostility."[4] Although race may seem to be a more immutable condition than religion,[5] and religious belief systems may appear to have a more interwoven effect than race on the conduct of people's lives, both traits have been the object of public (and private) stereotyping, stigma, subordination and persecution in strikingly similar ways.

In response, the Court has properly viewed both racial and religious discriminations with particular suspicion,[6] and demanded "that they be justified in terms of a significantly more pressing governmental objective than normally required, and a near perfect fit between the characterizations employed and the objective pursued."[7] This method is a "way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members,"[8] a course of conduct based on assumptions of the "differential worth"[9] of religious and racial groups including judgments of their odiousness or inferiority. Because it is extremely difficult for these

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[4] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949).

[5] For a discussion of the immutability of religious beliefs, see Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 62-63 (1992).

[6] In New Orleans v. Dukes, 427 U.S. 297, 303 (1976), the Court unanimously categorized religion along with race as being "suspect" classifications.

[7] Hall, *supra*, note 5, at 55. The few decisions of the Supreme Court that have involved deliberate disfavoring of persons or groups because of religious beliefs they do or do not hold have employed the test of strict scrutiny, either expressly or implicitly, to invalidate the regulations. *See* Church of the Lukumi Babalu Aye v. Hialeah, 113 S. Ct. 2217 (1993) (holding that a state may not forbid ritual animal sacrifice); McDaniel v. Paty, 435 U.S. 618 (1978) (holding that a state may not disqualify members of clergy from being legislators); Larson v. Valente, 456 U.S. 228 (1982), *reh'g denied*, 457 U.S. 1111 (1982) (holding that a state may not impose registration and reporting requirements only upon religious organizations that solicit more than half their funds from nonmembers); Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a state may not require notaries public to take oath of belief in God). The one possible exception, Gillette v. United States, 401 U.S. 437 (1971), did not acknowledge as being discriminatory the Selective Service Act provision that exempted from the draft individuals who were religiously opposed to "war in any form" but did not excuse those who were religiously opposed only to "unjust wars." *Id.* In any event, the Court's reasoning in *Gillette* is not necessarily inconsistent with its usual approach to the problem. *See* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and An Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 960 (1986).

[8] JOHN HART ELY, DEMOCRACY AND DISTRUST 153 (1980).

[9] Paul Brest, *Forward* to *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976).

stringent criteria to be met either factually[10] or legally,[11] very few classifications that intentionally prejudice persons because of their race or religion have been or will be upheld.[12]

It is useful to note the peculiar nature of the personal quality or characteristic that is the subject of the special judicial protection against deliberately disadvantaging people because of their religious principles. At issue are beliefs or membership in a group that shares a set of beliefs, rather than participation in some course of generally regulated conduct. This concerns an ideal that extends beyond the value of religious liberty, one that is deeply ingrained in several constitutional provisions apart from the Religion Clauses. Thus, the First Amendment freedoms of speech and association have frequently been used to protect a broad range of ideological convictions including religion,[13] and would be applicable here as well.

2. *Judicial Scrutiny of the Motives of Lawmakers*

The intentional prejudice category plainly includes government regulations that discriminate on their face. This category also condemns more subtle forms of state action which, by their explicit language, may appear to accomplish a constitutionally permissible end, but whose real aim is to disadvantage persons because they are members of a certain race or because they hold or do not hold certain religious convictions. This requires the Court to ascertain whether the lawmaking body intended to achieve a goal through the effect of the regulation that is not plainly prescribed by its words.

Despite "the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute,"[14] the Court's approach both to the Religion Clauses and to racial discrimination under the Equal Protection Clause has made legislative

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10 *See* Korematsu v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding military orders for exclusion and curfew of Japanese-Americans on the West Coast during World War II); *cf.* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring) (discussing possibility of temporary racial segregation in prison in response to racial tensions that threaten prison security).

11 The Court has ruled that government action preferring racial minorities and disfavoring the racial majority may be permissible, e.g., to remedy past discrimination in violation of statute or the Equal Protection Clause. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Sheet Metal Workers Local 28 v. EEOC, 478 U.S. 421 (1986).

12 Query as to the validity of requiring immunization of all members of a racial or religious group that seems peculiarly susceptible to a particular illness such as sickle cell anemia or Tay Sachs disease.

13 *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 581-83 (also suggesting the "fundamental rights branch of equal protection doctrine" as a source for protecting against "government action that deliberately singles out one or more religious groups for adverse treatment or that penalizes or withholds benefits from persons because of their peculiar sectarian beliefs").

14 *McDaniel*, 435 U.S. at 636 n.9 (Brennan, J., concurring).

and administrative motivation a major criterion.[15] Still, there is broad agreement, reaching back to the landmark ruling in *Fletcher v. Peck*,[16] that divining the real motives of lawmakers "is a perilous enterprise"[17] and "a notoriously tricky affair."[18] Thus, it is important to emphasize several factors that limit the scope of this judicial inquiry regarding lawmaking that is alleged to deliberately disadvantage people because of either their race or religion.

First, there is a substantial "distinction between those things a legislator hopes to accomplish *by the operation of the statute* for which he is voting, and those things he hopes personally to achieve *by the act of his vote*."[19] For example, in *Edwards v. Aguillard*,[20] the Court had before it a Louisiana statute that forbade "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.' "[21] The former category of "hopes" includes the question of whether a state legislator "voted for the Act . . . because he wanted to foster religion or because he wanted to improve education."[22] In contrast, the kinds of "hopes" described at length by Justice Scalia in *Edwards* fall more readily into the latter category:

> [A legislator] may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, . . . or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations.[23]

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15 *See id.* ("cases under the Religion Clauses have uniformly held such an inquiry [into legislative motive or purpose] necessary"); Washington v. Davis, 426 U.S. 229, 240 (1976) ("basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

16 10 U.S. (6 Cranch) 87, 130 (1810).

17 Thomas A. Schweitzer, Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduation Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113, 192 (1992).

18 Hall, *supra* note 5, at 65.

19 John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1218 (1970) (discussing Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104 (1961)).

20 482 U.S. 578 (1987).

21 *Id.* at 581.

22 *Id.* at 637 (Scalia, J., dissenting).

23 *Id.*

Admittedly, there is only a difference of degree rather than kind "between those things a person intends to result immediately from his act [the former category], and other more distant and less certain, but nonetheless intended, results [the latter category]."[24] Moreover, resolving even questions in the former category "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[25] But it appears to be within the judiciary's capacity to reach a decision about the former category with adequate certainty; exploring motivations in the latter category, however, seems to be "almost always an impossible task."[26]

Second, the process of examining an intention to disadvantage a racial or religious minority is to uncover only whether the government action is meant to implement unspoken antagonism toward such a minority. This judicial inquiry is quite narrow and vastly different from asking whether the legislators' purpose was in some oblique fashion to "advance" a religious or racial cause when promulgating a regulation that is religiously and racially neutral in both its language and administration. It is one thing to question whether a lawmaking body acted with racial or religious animus, such as, whether "an admittedly impermissible motive has poisoned the political process."[27] It is quite another to determine whether the purpose of a law that has concededly been enacted to serve permissible public welfare goals was in some part attributable to the racial or religious background, aspirations, ideologies or beliefs of members of the legislature.

Religious motivations of this type are especially hard to isolate because:

> Beginning with the Founding itself, the history of the United States reveals an inseparable connection between religion, morality, and law. Many of our laws, even our basic system of constitutional government and individual rights, rest to a significant degree on religious understandings of the world, of human beings, and of social relationships.[28]

Furthermore, individuals and groups often support a wide variety of political, social and economic policies because of their religious ideals.[29] If the "real" purpose of programs of this kind was a ground for

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24 Ely, *supra* note 19, at 1219.

25 Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

26 Edwards v. Aguillard, 482 U.S. at 636 (Scalia, J., dissenting).

27 Hall, *supra*, note 5, at 66.

28 Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 6-7 (1991).

29 Timothy Hall has noted religion's potential to influence social policies:

> Welfare programs may be supported for religious reasons relating to perceived obligations to the poor. Statutes restricting the availability of abortions may be supported by individuals who believe that abortion violates

judicial invalidation, then laws against homicide and theft would be constitutionally vulnerable under the Religion Clauses.[30] Because "religious beliefs and values may permeate a person's world view by underlying, reinforcing, and interacting with other 'secular' convictions,"[31] many legislators themselves would find it impossible to "fathom their reactions to cross-currents of psychic stimuli"[32] so as to distinguish between which of their social views have a worldly basis and which have deep religious roots. The problems for judges in unscrambling the multiple purposes and unconscious motivations of legislators in this context are greatly exacerbated when compared to those involved in the surgically precise determination of whether there was a specific legislative intention to disadvantage a racial or religious group.

a. *Examples*

Experience indicates that this confined inquiry into the motivations of lawmakers has been a manageable task for the federal courts. Fortunately, intentional religious or racial discrimination occurs only infrequently, and when it does, its suspicious appearance will ordinarily be fairly clear, even if wrapped "in the verbal cellophane"[33] of legitimacy. A few examples enforcing the racial equality precept of the Fourteenth and Fifteenth Amendments should help demonstrate the usual ease by which the judiciary may state the obvious to smoke out illicit purposes of the overwhelming percentage of legislators. In *Gomillion v. Lightfoot*,[34] the Court held that the gerrymandering of Tuskegee, Alabama, which altered the city's shape "from a square to an uncouth twenty-eight sided figure,"[35] was unconstitutional because it could have no purpose other than the disenfranchisement of blacks in municipal elections.[36] The Court found it "difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect

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> God's law. The Civil Rights Act of 1964 was passed with substantial support from religious believers who supported the Act, in part, on religious grounds.

Hall, *supra* note 5, at 68. *See generally* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

30 *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 998 (1989).

31 Schweitzer, *supra* note 17, at 195.

32 Gary Leedes, *Taking the Bible Seriously*, 1987 AM. B. FOUND. RES. J. 311, 315.

33 United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting).

34 364 U.S. 339 (1960).

35 *Id.* at 340.

36 *Id.*

invalid."[37] A similar case, *Guinn v. United States*,[38] dramatically illustrates that some instances of inevitable effect "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[39] *Guinn* invalidated Oklahoma's literacy test for voting because its "grandfather clause" effectively exempted whites.[40] Oklahoma then immediately enacted a new rule providing that all persons who had previously voted were qualified for life but that all others must register within a twelve day period or be permanently disenfranchised.[41] In *Lane v. Wilson*,[42] the Court rejected the new Oklahoma rule on the ground that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination."[43]

Until recently, there were *no* cases in which the Supreme Court found it necessary to examine legislative motive in order to secure religious liberty against willfully prejudicial government regulations. But this changed with the 1993 decision of *Church of the Lukumi Babalu Aye v. Hialeah*,[44] which invalidated ordinances that barred ritual animal sacrifice. The Court agreed that the words of the regulations were "consistent with the claim of facial discrimination."[45] However, because the language was "not conclusive,"[46] the Court found that "[t]he [legislative] record . . . compels the conclusion that suppression of . . . [religious] worship service was the object of the ordinances."[47] No member of the Court dissented from the following judgment:

> The pattern . . . . discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more reli-

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37 *Id.* at 342. Alexander Bickel observed that:

> Fanciful suggestions might have been possible, and they might have included whim; but they would all have been disingenuous on their face given the meticulous care with which, running the line house-by-house, the legislature succeeded in [removing all but four or five of the municipality's black voters while] not eliminating a single previous white resident of Tuskegee from the new city limits.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 211 (1962).

38 238 U.S. 347 (1915).

39 Washington v. Davis, 426 U.S. 229, 242 (1976).

40 *Id.*

41 *Id.*

42 307 U.S. 268 (1939).

43 *Id.* at 275.

44 113 S. Ct. 2217 (1993).

45 *Id.* at 2227.

46 *Id.*

47 *Id.* at 2231.

gious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.[48]

Moreover, there has been a series of church-state rulings, involving government programs to *favor* religion, which further demonstrates that finding a law's "pre-eminent purpose,"[49] as required in order to identify deliberate *disfavor*, is a relatively straightforward task. In *Epperson v. Arkansas*,[50] invalidating a statute prohibiting the teaching of evolution in public schools, the Court concluded that "Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine."[51] Citing newspaper advertisements and letters supporting adoption of the statute in 1938, the Court found it "clear that fundamentalist sectarian conviction was and is the law's reason for existence."[52] Similarly, in *Torcaso v. Watkins*,[53] the Court observed that there could be "no dispute about the [religious] purpose"[54] of a requirement that public officeholders declare a belief in God.[55] And in *Engel v. Vitale*,[56] the Court had "no doubt that . . . daily classroom invocation of . . . the Regents' prayer is a religious activity."[57] This conclusion was greatly bolstered by the Regents' Statement on Moral and Spiritual Training in the Schools which proclaimed the prayer's goal to be "teaching our children . . . that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights."[58]

In other cases invalidating religious influences in the public schools, the Court has drawn on common understanding to impeach what it concluded were obviously implausible assertions that there were nonreligious purposes for the challenged practices. In *Abington School District v. Schempp*,[59] the school boards contended that the reading, without comment, of a chapter of the Bible at the opening of the school day served such nonsectarian ends as promoting moral values, contradicting the materialistic trends of the times, and teaching literature. The Court's brusque reply was that "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid."[60] Similarly, in

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48 *Id.* at 2231.
49 Stone v. Graham, 449 U.S. 39, 41 (1980).
50 393 U.S. 97 (1968).
51 *Id.* at 103.
52 *Id.* at 107-08.
53 367 U.S. 488 (1961).
54 *Id.* at 489.
55 *Id.*
56 370 U.S. 421 (1962).
57 *Id.* at 424.
58 Record at 28, *Engel*, 370 U.S. 421.
59 374 U.S. 203 (1963).
60 *Id.* at 224.

Stone v. Graham,[61] the Court summarily reversed a decision of the Kentucky Supreme Court which had upheld the practice of posting copies of the Ten Commandments in public school classrooms.[62] The avowed purpose for the state program was printed at the bottom of each copy: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[63] Observing that the Commandments were not integrated into any study of history, ethics or comparative religion, but could only have the effect, if any, of inducing students to meditate on, revere, or perhaps obey them, the Court concluded that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[64] In the late 1950s, when a New York school board similarly required that a "neutral version" of the Ten Commandments be placed in all classrooms, it was not so disingenuous as the Kentucky legislature. The New York school board's announced purpose "to strengthen the moral and spiritual values of the students in the school district,"[65] was struck down.[66] Finally, in *Wallace v. Jaffree*,[67] an Alabama statute, authorizing a moment of silence in all public schools "for meditation," was amended to read "for meditation or voluntary prayer."[68] The only conceivable purpose for the changed language was to clarify the intent that the period be used for prayer. No state witnesses suggested otherwise, and the amendment's prime legislative sponsor acknowledged the aim of returning prayer to public schools.[69]

b. *Procedures*

The Supreme Court, aided by perceptive commentators,[70] has developed an approach for ascertaining invidious purpose in the area of race.[71] It has been less clear on a detailed method for determining similar motives in the area of religion. However, the parallels between

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61 449 U.S. 39 (1980).

62 *Id.*

63 *Id.* at 41.

64 *Id.*

65 Robert J. Coan, Comment, *Bible Reading In the Public Schools*, 22 ALB. L. REV. 156, 156 (1958).

66 *Id.* at 157 n.4.

67 472 U.S. 38 (1985).

68 *Id.* at 40.

69 *Id.* at 56-57 & n.43.

70 *See, e.g.*, Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

71 *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

race and religion outlined here strongly suggest that the same system be employed.

Articulation of a specific set of rules on the subject is beyond the scope of this Article, but a few basic points may be sketched. The approach to intentional discrimination on the basis of religion or race should *not* be that invalidity requires that "there was *no* question that the statute or activity was motivated *wholly* by religious [or racial] considerations"[72] of the kind prohibited by the Constitution. Such government action, "to avoid suspicion, must have more than a mere rational relationship to some valid nonreligious [or nonracial] purpose";[73] it should be more than "minimally related to the promotion" of some permissible objective.[74] That standard would automatically immunize virtually all regulations that threaten racial or religious liberty in the most objectionable way. If the Court has good reason to believe—and it may be that there is no "better" way to describe the "test" which, as we have seen, is usually satisfied quite readily—that a deliberate effort to harm persons or groups because of their race or their religious beliefs has played a material role in the decisionmaking process—especially if the Court's judgment is informed by general societal perception—then certain procedural rules should come into play. For example, in order to dispel the inference of illicit motivation, I would favor placing the burden on the state to show that it has no alternative means to achieve its permissible objective "that is both less drastic in terms of effects adverse to the [nondiscrimination principle] and not beyond the state's capacity to implement."[75] By stipulating that an improper purpose need be only a material (or substantial) rather than the predominant (or primary) factor in order to trigger special attention and by assigning the burden of justification to those defending the government action, this procedure seeks to uncover concealed animosity toward racial and religious groups while also allowing the state the opportunity to accomplish any lawful goal that it may have.

B. Intentional Advantage

1. *Favoring Majorities*

a. *Differences between race and religion*

Deliberately benefiting the racial majority concomitantly prejudices racial minorities. It therefore falls within the preceding

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72 Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (emphasis added).

73 Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 329 (1989).

74 Brest, *supra* note 70, at 122.

75 Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 923 (1987).

analysis and plainly violates existing constitutional principles as well as moral norms. In contrast, intentionally supporting mainstream religions[76] has not unfailingly been held to be invalid.[77] This judicial posture reflects the value judgment that it is worthwhile for government to acknowledge the feelings of members of religious faiths about "their most central values and concerns" by responding to their wishes not to be "excluded from a public culture devoted purely to secular concerns."[78] In my view, these "accommodations" should survive constitutional attack if they do not pose a meaningful threat to religious liberty.[79] While intentionally *disadvantaging* individuals because of their religion is the constitutional and moral equivalent of invidiously discriminating against people because of their race, our historic traditions and contemporary experience indicate that there are significant differences between race and religion when deliberate *advantage* is at issue. These distinctions are sufficient to warrant contrasting constitutional treatment.

Government action that purposefully confers a benefit on whites—for example, exempting them from a rule against serving alcoholic beverages to minors, or making public property available to celebrate the Confederacy—ordinarily treats nonwhites with a tangible disrespect by denying a meaningful privilege. Alternatively, such ac-

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76 Among the more than one thousand different religions in the United States, I include in the term "mainstream" those defined by a recent study as "Protestantism as it finds expression among the Baptists, the Methodists, the Episcopalians, the Presbyterians, the Congregationalists, the Disciples of Christ and the Lutherans, as well as the other two 'great faiths,' 'Catholicism and Judaism.' " I contrast these with "groups that have been called 'marginal' or 'non-normative' or 'cults' in their history, such as Mormons and Christian Scientists, Spiritualists and Theosophists, followers of Meher Baba or the Reverend Sun Myung Moon, practitioners of Hare Krishna, feminist witchcraft, or Zen." MARY BEDNAROWSKI, AMERICAN RELIGION: A CULTURAL PERSPECTIVE 2-3 (1984). The "mainstream" has been described more succinctly as "the dominant, culturally established faiths held by the majority of Americans." WADE ROOF & WILLIAM MCKINNEY, AMERICAN MAINLINE RELIGION: ITS CHANGING SHAPE AND FUTURE 6 (1987).

77 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (upholding holiday display of Chanukah menorah and Christmas tree outside city-county building); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding city's inclusion of creche in annual large Christmas display in private park).

78 Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 311 (1987). Some commentators observed that

> [T]he Founders affirmed the importance of religion to the new republic and would have rejected the use of the establishment clause to eradicate the religious leaven from public life. Instead, while recognizing the historical dangers posed by religious establishments, they would agree that government may acknowledge the crucial importance of religion to many citizens.

Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1616 (1989).

79 *See* Jesse H. Choper, *Church, State and The Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551, 553-57 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) [hereinafter, Choper, *Reconciling the Conflict*].

tions convey a message of racial insensitivity that is usually not present when analogous action benefits mainstream religions. While I agree that "[a] favorable statement about one class is not necessarily a correlative pejorative remark about another class,"[80] that is *not* true in the racial examples just given.

On the other hand, although I concede that "[w]hen government displays the symbols of the dominant religion—as when government displays the symbols of white supremacy—the pain is not distributed evenly,"[81] I do not believe that the message sent to religious minorities in the former situation is in any meaningful way as hurtful and offensive as it is to racial minorities in the latter. This is probably true in part because the substantive precepts of both mainstream and minority faiths (such as the golden rule or most of the Ten Commandments) are often perceived as containing special value for the welfare of society. As a consequence, it is possible that favor or support for some religions may be viewed as public appreciation for certain appealing beliefs or for various wholesome activities rather than as an indirect expression of disrespect toward other, "non-preferred" religions. The overtones of racial prejudice and intolerance historically associated with messages of white supremacy, for example, are simply not present. Thus, favoring the dominant racial group realistically imposes the same constitutionally forbidden harm as deliberately disadvantaging racial minorities, and should be almost always invalid. Assisting mainstream religious groups, however, need not be forbidden, in my judgment, unless it adversely affects religious liberty. In contrast to our national ideal that a person's race should be irrelevant to decisionmaking by government officials and private citizens, our heritage has traditionally affirmed the unique contribution of religious institutions to the pluralism of American society and has positively approved of the flourishing of religious freedom.

b. *Judicial scrutiny of the motives of lawmakers*

Although intentional government favoring of religion does not automatically produce a violation of the Religion Clauses under my approach, it does remain a significant factor in determining constitutionality. Therefore, like scrutiny of actions that deliberately disadvantage racial or religious groups, this requires an assessment of legislative purpose. There is an important distinction between a lawmaking body intending to give an "advantage" to—or, in alphabetical order, to "advance," "aid," "assist," "benefit," "favor," "help," "sponsor," or "sup-

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80 William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 365 (1991).

81 Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 511 (1992).

port"—a religious cause, and state action that is concededly taken to further legitimate public welfare ends but is in some part traceable to the religious affiliation, ideals, ideologies or values of members of the legislature.[82] It is the deliberate conferral of an advantage of the first kind that is the subject of discussion here and that calls for examination of lawmakers' motivations in an effort to ascertain what they really hoped to accomplish through the *operation* of their enactment. Because action of the first kind is more constitutionally vulnerable than action of the second kind[83] (or than action undertaken for truly mixed motives),[84] lawmakers may be encouraged to cloak their real design, thus increasing the need for judicial standards that can readily identify the legislators' true intentions.

Fortunately, this incentive to conceal actual motivations is not as great as it is in the context of purposefully *disadvantaging* racial or religious interests—probably because deliberately *favoring* mainstream religious groups is not seen as being as hostile to deeply held national values as are conscious attempts to prejudice persons because of their race or their religious beliefs. Therefore, most legal enactments that favor religion do so plainly by their terms—for example, a statutory military draft exemption for religious objectors or a city's display of a Latin cross on public property—and pose no problems of going behind the letter of the law to discover purpose.

Admittedly, some government efforts to favor religion are more subtle (or even hidden) and either make no mention of religion or characterize as nonsectarian an activity that is generally understood as having only a religious basis.[85] Still, in such cases, discerning legislative intent readily falls within judicial capacity: the suspicious appearance of these programs will ordinarily be quite clear even if disguised in the garb of secular public welfare. Indeed, when discussing the relative ease of discerning motivation in the intentional prejudice category above,[86] almost all of the illustrations from the religious area, in contrast to race, grew out of government attempts to *favor* religion—public school activities like Bible reading, prayer, teaching evolution and creation science and posting the Ten Commandments in classrooms. Additionly, several cases concerning government programs that officially acknowledge religion—legislative prayers by chaplains, and the

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82 *See supra* notes 27-32 and accompanying text.

83 *See supra* notes 27-32 and accompanying text.

84 This third category covers situations in which many lawmakers wish to accomplish either both ends, or one of the two ends. Regulations prohibiting abortion and providing aid to parochial schools strike me as especially good examples.

85 Assume that the school board of an overwhelmingly Catholic community explained its requirement that the catechism be taught to all first graders in the public schools as a technique to develop memory skills.

86 *See supra* notes 44-69 and accompanying text.

display of crèches and menorahs on public property—present activities that may be readily categorized as purposefully meant to favor religion. Occasional protestations by some justices to the contrary notwithstanding,[87] the straightforward assessment of most members of the Court comports with the general public perception. As under the intentional prejudice category, this assessment makes the delicate inquiry into what the lawmaking body really hoped to accomplish a manageable task.

2. *Favoring Minorities: Differences Between Race and Religion*

The constitutional implications are generally similar for government action that intentionally favors a *minority* racial or religious group and government action that grants deliberate advantage to the *majority*. Affording a preference to a minority religious group is much more likely to be upheld than intentionally granting an advantage to a minority racial group.

Although not adherents of the neutrality approach,[88] traditional liberal church-state separationists like Justice Brennan,[89] advocates of the endorsement approach to interpreting the Religion Clauses developed by Justice O'Connor,[90] and conventional deferential conservatives like Justice Scalia[91] would all sustain state action that grants special consideration to adherents of minority religions by excusing them from generally applicable government regulations that burden them because of the tenets of their faith. Most church-state theorists conclude that no special constitutional scrutiny is ordinarily required in such instances, although they usually feel obliged to explain their reasoning as to why extending this special protection for religious exercise does not conflict with the Establishment Clause. My own view is somewhat different: government preferences for both minority and mainstream religions should be treated in the same way in that both

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87 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 616-21, (1989) (Blackmun, J., announcing judgment of the Court) (display of Christmas tree and menorah "simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season"); Lynch v. Donnelly, 465 U.S. 668, 680-81 (1984) (crèche has "legitimate secular purposes" and "depicts the historical origins" of Christmas); *id.* at 691 (O'Connor, J., concurring) (crèche has "legitimate secular purpose" and "celebrat[es] . . . the public holiday through its traditional symbols").

88 *See* Choper, *Reconciling the Conflict*, *supra* note 79, at 688 (noting that the neutrality approach, articulated most fully by Professor Kurland, has never been embraced by any member of the Court).

89 *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

90 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 346-49 (1987) (concurring opinion).

91 *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 29-33 (1989) (dissenting opinion).

should be invalid when they pose a meaningful threat to religious freedom.[92]

There is much greater disagreement among scholars and judges (and among elected officials and the citizenry at large) about whether government may grant some form of preference to minority racial groups. Much of this dispute stems from the different contexts in which government attempts to assist religious or racial minorities. Intentionally conferred religious benefits ordinarily take the form of exemptions from generally applicable regulations, usually for very small numbers of people. These immunities seem relatively benign, and often desirable, because they are granted to make it easier for people to adhere to the dictates of their faiths and are thereby seen as promoting religious liberty. Programs that intentionally benefit racial minorities, in contrast, usually impose broader structural changes with respect to government benefits such as employment and education, "characteristically occur[ring] in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race."[93]

These race-conscious plans have been grounded in several rationales which lend support to different types of programs. The most widely—indeed, near universally—accepted justification for a government entity's use of a racial classification is as a remedy for its own past racial discrimination against the persons or group that is now being benefitted.[94] Another goal that has been frequently advanced as justifying affirmative action programs is obtaining the benefits that flow from racial diversity.[95] This purpose is particularly relevant in the educational setting, where it has been urged that people from a variety of ethnic, geographic and economic backgrounds will contribute to the exchange of a broader range of ideas in the classroom.[96] This dialogue, it is argued, will enrich the education of the entire student body and "better equip . . . graduates to render with understanding their vital service to humanity."[97] Probably the most controversial argument

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92 *See id.*

93 Shaw v. Reno, 113 S. Ct. 2816, 2846 (1993) (Souter, J., dissenting).

94 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In fact, this type of action has been characterized by one of the Court's most vocal opponents of racial preferences as "race-neutral remediation"—that is, as nothing more than a "preference to identified victims of discrimination" regardless of their race. *Id.* at 526 (Scalia, J., concurring). *See* Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 263 (1987).

95 Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 311-15 (1978) (plurality opinion of Powell, J.).

96 *Id.* at 312-13 n.48.

97 *Id.* at 314.

for the legitimacy of preferential treatment of minorities[98] is that this is needed to counter the effects of societal discrimination, both historical and ongoing.[99] A variety of defenses has been offered for this position. One is the view that unequal distributions of economic resources and opportunities, or de facto exclusion of racial minorities from meaningful participation in the political process are as harmful, and as offensive to the Equal Protection Clause, as de jure discrimination.[100] Increasing opportunities and representation of minorities offset these effects by producing various "tangible and fully justified future benefits."[101] Among these are the emergence of "role models"—examples of success that other members of the minority group will emulate in the future.[102]

Proponents of affirmative action programs contend that it is constitutionally permissible to disadvantage members of the racial majority in order to further these goals. First, because these race-based remedies serve "benign" government purposes and because whites do not have the traditional indicia of suspectness, disadvantaged members of the racial majority cannot experience the stigmatic harm that minorities have experienced.[103] Second, the means and ends of such programs will remain "benign" over time because the racial majority is unlikely to disadvantage itself due to prejudice or to underestimate its own needs.[104] Finally, because subtle forms of de jure discrimination against racial minorities presently exist anyway, it is unrealistic to use the Equal Protection Clause's ideal of "colorblindness" to prohibit race-based policies that seek to make minority groups whole.[105]

From the other side of the spectrum, many persons find governmentally conferred preferences for racial minorities to be trouble-

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98 A more extreme, but not seriously debated, ground in favor of special benefits to racial minorities is compensating them for past discrimination. *Bakke*, 438 U.S. at 306 n.43; *see* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973). Underlying this purpose is a recognition that prior de jure discrimination leaves minorities underrepresented in various walks of life even after the discrimination has ended and that long-term underrepresentation stigmatizes minority groups.

99 A majority of the Court has rejected this as a constitutionally adequate justification for a racial classification. *See Croson*, 488 U.S. at 497-98 (1989).

100 *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487-88 (1976) ("Providing unequal and inadequate school resources and excluding black parents from meaningful participation in school policymaking are at least as damaging to black children as enforced separation.").

101 *Croson*, 488 U.S. at 511 n.1 (Stevens, J., concurring).

102 Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 391 (1974).

103 *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in the judgment in part and dissenting).

104 John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

105 *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in the judgment in part and dissenting).

some, particularly because for every person of one racial group who benefits, someone of another racial group is deprived. The four members of the Court who joined Justice O'Connor's dissenting opinion in *Metro Broadcasting v. FCC*,[106] involving a federal policy granting racial minorities a preference in ownership of radio and television licenses, articulated this concern as follows:

> "Benign racial classification" is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity . . . exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, securing to *each* individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group.[107]

Similarly, Justice Scalia has taken the position that special government exceptions for religious minorities are readily permitted,[108] but in *City of Richmond v. J.A. Croson Co.*,[109] involving a preference for minority businesses in securing city construction contracts, he wrote that a racial quota "derogates the human dignity and individuality of all to whom it is applied. . . . Moreover, it can easily be turned against those it purports to help."[110] He argued further that "even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race."[111]

Finally, Justice Kennedy's dissent in *Metro Broadcasting* contended that granting advantages to racial minorities may actually stigmatize the present members of the majority racial group by implying that they are responsible for the past discrimination that prompted the affirmative action programs.[112] Moreover, these policies may also disparage the beneficiaries by suggesting that they are "inherently less able to compete on their own."[113]

Thus, some observers view government preferences for racial minorities as conveying the same constitutionally impermissible message of disrespect to the racial majority as invidious government discrimination against minorities conveys to the members of minority groups. As

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106 497 U.S. 547 (1990).

107 *Id.* at 609 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (citation omitted).

108 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (Scalia, J., dissenting).

109 488 U.S. 469 (1989).

110 *Id.* at 527 (Scalia, J., concurring in the judgment) (*quoting* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

111 *Id.* (Scalia, J., concurring in the judgment).

112 497 U.S. at 637 (Kennedy, J., dissenting).

113 *Id.* at 636 (Kennedy, J., dissenting).

a consequence of this division of opinion, the appropriate level of scrutiny for a minority racial preference is much less clear than for a religious exemption from generally applicable government rules. Some members of the Court suggest that racially-based affirmative action programs should be subject to the same strict scrutiny applied to any other racial classification.[114] Others contend that they should be subject to the "intermediate level" scrutiny applied to gender-based classifications.[115] All members of the Court agree, however, that some form of heightened scrutiny is appropriate, in marked contrast to their approach to preferences for minority religious faiths.

II
EFFECT

A. Burdensome Impact: Differences Between Race and Religion

Actions *intended* to disadvantage either a racial or a religious group are both properly subject to a rule of almost per se invalidity. But despite the fact that the Court subjects "to the most exacting scrutiny laws that make classifications based on race,"[116] it has expressly declined[117] to give any but the most deferential review to "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group."[118] Whether or not this interpretation of the Equal Protection Clause is correct,[119] there is a stronger argument, in my view, for finding that "generally applicable religion-neutral laws that have the effect of burdening a particular religious practice"[120] are more threatening to constitutional values[121] than government action that has a disproportionate impact on minority racial groups.

A core value of the Equal Protection Clause is to forbid people from being prejudiced because of their race. Race-neutral laws that have a disproportionate impact on minority racial groups do not injure members of those groups *because of* their race, but because the minority group members are disproportionately represented in the larger group affected (often the poor, or the poorly educated), all of whom are suffering disadvantage.[122] Not all people who suffer the spe-

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114 *Croson*, 488 U.S. at 494.

115 *Metro Broadcasting*, 497 U.S. at 564-65.

116 *Smith*, 494 U.S. at 886 n.3.

117 Washington v. Davis, 426 U.S. 229 (1976) (holding that in cases of alleged racial discrimination, strict scrutiny under the Equal Protection Clause is triggered only if it is shown that the government intends to treat racial groups differently).

118 *Smith*, 494 U.S. at 886 n.3.

119 *See infra* note 126 and accompanying text.

120 494 U.S. at 886 n.3.

121 For further development, see Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991).

122 Admittedly, there may be exceptional situations in which minority group members suffer unique injury because of their race from the effect of laws that are race-neutral by

cial operative consequences of the government action are members of the racial group and not all members of the racial group suffer the operative consequences.

A core value of the Religion Clauses is to forbid people from being prejudiced because of their religion. This parallels the prohibition of the Equal Protection Clause as to race. However, since religion not only confers a status but also imposes an often multi-faceted belief system on its adherents, religion-neutral laws that have the effect of burdening a particular religious practice do injure persons *because of* their religion. Even though these laws have a fully legitimate public purpose and achieve beneficial results generally, *all* persons who suffer the special operative consequences adverse to their belief system are necessarily members of that religion and *all* members of that religion suffer the special operative adverse consequences. As a result of this unique effect on religion, laws that unintentionally burden the exercise of religion are more analogous to laws that deliberately disadvantage racial or religious groups than they are to laws that inadvertently impose disproportionate disadvantage on minority racial groups.[123] This similarity between burdensome effect on religion and the type of *de jure* discrimination that is most offensive to the Constitution justifies heightened judicial scrutiny of the impact of such laws under the Religion Clauses, although such effects might not be reviewed so carefully under the Equal Protection Clause.

There is an additional reason, grounded in weighty practical considerations, for a constitutional rule that is more protective of religion than race against neutral laws that have disproportionate impacts. While the traditional relief from regulations that intentionally prejudice racial or religious groups is to completely strike down that part of the law imposing the disadvantage, the usual remedy where a law inad-

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their terms and intent. *See* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 298-307 (1972). There is a good argument that the Court should apply some form of heightened scrutiny here as well as in respect to the analogous situation with minority religions.

[123] The paradigmatic instance of deliberately disadvantaging a racial group is government action that by definition prejudices *all* members of a racial minority and *only* such persons: for example, a law that excludes all blacks from serving on juries. There are also instances of laws that intentionally disadvantage a minority group but that do not necessarily affect all members of the group. For example, a law forbidding all blacks without high school diplomas from serving on juries intentionally disadvantages blacks, and thereby is as offensive to the Constitution as a law forbidding all blacks from serving, even though it does not affect all blacks. These types of laws demonstrate some of the subtlety involved in defining discrimination and refute the proposition that *all* intentional discrimination necessarily affects all members of the group subject to disadvantage. *Cf.* Geduldig v. Aiello, 417 U.S. 484 (1984) (denial of disability benefits for pregnancy and childbirth does not discriminate against women). Nevertheless, the paradigm case best illustrates both the fundamental evil of intentional discrimination—prejudicing minorities *because of* their minority status—and why laws that unintentionally burden religious minorities exhibit a similar evil.

vertently burdens minority religious groups is simply to grant an exemption. Therefore, protecting against burdensome effects on religion will usually result only in limiting the reach of government action in discrete instances. Protecting against burdensome effects on race, in contrast, would have much broader consequences. In holding that an equal protection challenge fails if a law with a racially discriminatory effect has "some rational basis,"[124] the Court was significantly influenced by the recognition that a more restrictive rule would realistically eliminate or severely disrupt many important longstanding and widely supported arrangements such as, "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges."[125] It would hardly be feasible to excuse all members of racial minority groups from the obligations of these programs. But granting a religious exemption in response to a successful free exercise challenge in this context ordinarily carries only a modest societal impact and has proven to be a traditionally accepted and workable remedy.

B. Beneficial Impact: Differences Between Race and Religion

State programs that inadvertently disfavor minority racial groups have been the subject of substantial constitutional challenge.[126] However, judges and scholars have not seriously questioned the validity of government action that has unintended beneficial effects for the racial *majority*—an example might be agricultural price supports. The likely reason for this disparity is that adventitious favoring of the dominant racial group does not carry with it an associated message of disrespect for those racial groups that are not so advantaged. It follows as a matter of both logic and policy that government action that inadvertently favors a *minority* racial group—an example might be Aid to Families with Dependent Children—presently stirs no constitutional debate.

Some proposals for interpreting the Religion Clauses similarly ignore the beneficial effects of government action. For example, under the neutrality approach,[127] as long as the state regulation does not draw a religious classification, the fact that it favorably affects religious interests within a sufficiently larger category is irrelevant to its constitu-

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124 *Davis*, 426 U.S. at 247-48.

125 *Id.* at 248 n.14 (quoting Goodman, *supra* note 122, at 300).

126 *See, e.g.*, City of Memphis v. Greene, 451 U.S. 100 (1981); City of Mobile v. Bolden, 446 U.S. 55 (1980); Washington v. Davis, 426 U.S. 229 (1976). Scholarly commentary is extensive. *See, e.g.*, Theodore J. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

127 *See* discussion *supra* note 88 and accompanying text.

tionality. Most significant efforts to develop legal doctrines for the resolution of disputes under the Religion Clauses, however, attribute substantial importance to impact. Thus, a major element of the Supreme Court's *Lemon*[128] test, the governing approach to judging Establishment Clause issues since the early 1970s, is that a law's "principal or primary effect must be one that neither advances nor inhibits religion."[129] In Justice O'Connor's development of the endorsement approach, she also emphasized the effect of government action by making the *perception* of a reasonable or objective observer determinative.[130] Finally, Justice Kennedy's "coercion" approach—originally constructed as an alternative to both the *Lemon* test and the endorsement proposal[131] and, in my view, the governing standard on the Supreme Court for Establishment Clause questions during the 1992-1993 Term[132]—looks almost exclusively to the way that the challenged regulation operates.[133]

Under my approach, the Religion Clauses' dominant concern of protecting religious liberty should extend to government action that has the inadvertent effect of benefiting religion. At the outset, it should be noted that apart from some deliberate efforts by government to favor sectarian interests, there are virtually no laws whose *only effect* is to aid religion; practically every government rule can reasonably be found to ultimately influence some public welfare end. A number of such regulations, however, accomplish the secular goal only as a consequence of the prior achievement of a religious purpose. To put it another way: the secular effect is not independent; rather, it depends on (or derives from) the initial completion of the religious aim. These laws, in Madison's words, "employ Religion as an engine of Civil policy."[134] To immunize them because of their public welfare benefits would, I believe, effectively read much of the core of the Establishment Clause out of the First Amendment.[135] For example, it

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128 Lemon v. Kurtzman, 403 U.S. 602 (1971).

129 *Id.* at 612. The Court's earlier "test" also required that a law's "primary effect" may not be either "the advancement or inhibition of religion." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

130 County of Allegheny v. ACLU, 492 U.S. 573, 625-26 (1989) (O'Connor, J., concurring); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

131 *See* Jesse H. Choper, *Separation of Church and State: "New" Directions by the "New" Supreme Court*, 34 J. CHURCH & ST. 363, 364-65 (1992).

132 *See* Lee v. Weisman, 112 S. Ct. 2649; Jesse H. Choper, *Benchmarks*, 79 A.B.A. J. 78, 80 (1993).

133 County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part).

134 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, sec. 5 (1786), *quoted in* Everson v. Board of Educ. 330 U.S. 1, 67 (app.) (1947).

135 *See* Choper, *supra* note 13, at 607 n.142.

would justify state subsidization of that church which the government found best inculcates its members with the deep convictions that make for better citizenship. Accordingly, in my view, government action—regardless of its purpose or general applicability—that benefits religious interests and has no independent secular impact[136] should violate the Establishment Clause if the action poses a meaningful danger to religious liberty. This principle should apply if the law aids *any* religion—mainstream or minority.

Because government expenditures that eventually provide a financial advantage to church-related institutions probably comprise the largest category of state programs that have the unplanned effect of aiding religion, it is appropriate to conclude this discussion by explaining why these public appropriations may pose a threat to the religious freedom of individuals and groups. In the judgment of many, "[t]he most serious infringement upon religious liberty"[137] is posed "by forcing [citizens] to pay taxes in support of a religious establishment or religious activities."[138] This is cogently confirmed by Thomas Jefferson's "Virginia Bill for Religious Liberty"[139] which proclaimed "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical";[140] by James Madison's "Memorial and Remonstrance Against Religious Assessments,"[141] which condemned even forcing "a citizen to contribute three pence only of his property" to support any religious establishment;[142] by Thomas Cooley's *Constitutional Limitations*,[143] which found clearly unlawful "under any of the American constitutions . . . [c]ompulsory support, by taxation or otherwise, of religious instruc-

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136 For amplification, see Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 279 (1968).

137 Leo Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 9, 18 (1961). *See* Flast v. Gardner, 271 F. Supp. 1, 15 (S.D.N.Y. 1967), *rev'd* 392 U.S. 83 (1968) (dissenting opinion by Frankel, J.). Judge Frankel noted that "[i]t is now familiar to all who have touched this subject that a central concern—perhaps the most central concern—of the Establishment Clause is to ban utterly the use of public moneys to support any religion or all religions." *Id.* at 6. *See generally* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); Adams & Emmerich, *supra* note 78, at 1620-21.

138 Paul G. Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 3, 9 (1961).

139 12 Hening, Statutes of Virginia 84 (1823). *But cf.* MARK D. HOWE, THE GARDEN AND THE WILDERNESS; RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 26 (1965).

140 12 Hening, Statutes of Virginia 84 (1823).

141 MADISON, *supra* note 134, *quoted in* Everson, 330 U.S. 1, 65-66 (app.). *See also Flast*, 271 F. Supp. at 6-7 (dissenting opinion of Frankel, J.) (" 'Support' by use of taxpayers' money lay at the heart of Jefferson's and Madison's concern."); Leo Pfeffer, *Federal Funds for Parochial Schools? No*, 37 NOTRE DAME L. REV. 309, 310-11 (1962).

142 *Id.*

143 THOMAS M. COOLEY, 2 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 966-67 (8th ed. 1927).

tion";[144] and by many important Supreme Court opinions.[145] Indeed, one need look no further than the Court's first major interpretation of the Establishment Clause in which the justices, unanimously emphasizing the "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions,"[146] reasoned that the First Amendment means at least that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[147]

While public subsidy of religion may not directly influence people's beliefs or practices, it plainly coerces taxpayers either to contribute indirectly to their religions or, even worse, to support sectarian doctrines and causes that are antithetical to their own convictions. As a matter of both historical design and present constitutional policy, the Religion Clauses—particularly the Establishment Clause—should be interpreted to forbid so basic an infringement of religious liberty.[148] Where such a meaningful threat to freedom exists and there is no independent secular impact, the government action should be invalid under the Establishment Clause.

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144 *Id.*

145 *See, e.g.*, *Engel*, 370 U.S. at 442 n.7 (Douglas, J., concurring); McGowan v. Maryland, 366 U.S. 420, 452-53 (1961); McCollum v. Board of Educ., 333 U.S. 203, 248-49 (1948) (Reed, J., dissenting); *Everson*, 330 U.S. at 8, 10-12; *id.* at 33, 41, 44, 52-53 (Rutledge, J., dissenting); *see also* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 48-49 (1815).

146 *Everson*, 330 U.S. at 11.

147 *Id.* at 15.

148 The existence of an *individual* right not to have one's compulsorily raised tax funds spent for religious purposes explains the Court's decision in Flast v. Cohen, 392 U.S. 83 (1968), granting federal taxpayers standing to challenge federal expenditures allegedly in violation of the Religion Clauses. As the Court put it:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. . . . The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim.

Id. at 103. *See also id.* at 114 (Stewart, J., concurring) ("Because . . . [the Establishment Clause] plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution."). Finally, Justice Harlan's dissent, acknowledged the essence of the Court's reasoning "that a taxpayer's claim under the Establishment Clause is 'not merely one of ultra vires,' but one which instead asserts 'an abridgment of individual religious liberty' and a 'governmental infringement of individual rights protected by the Constitution.'" *Id.* at 125 (Harlan, J., dissenting) (citing Choper, *supra* note 136, at 276).

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LAWS INTENTIONALLY FAVORING MAINSTREAM RELIGIONS: AN UNHELPFUL COMPARISON TO RACE

Gary J. Simson†

In various articles spanning the past thirty years, Jesse Choper has argued for a rather indulgent approach to laws adopted to favor one or more religions.[1] According to Choper, intentional government preferences for religion should survive Establishment Clause review as long as they are not likely to "impair religious freedom,"[2] by which he means not likely to make people either (1) act contrary to their religion, (2) engage in a religious activity that, though not barred by their religion, they would not otherwise have engaged in, or (3) contribute financial support to religion.[3]

Applying this approach, Choper has, for example, argued that the Supreme Court erred in striking down a Kentucky statute that required public schools to post the Ten Commandments in all classrooms[4] and an Arkansas statute that prohibited public schools from teaching evolution.[5] He also has made clear that, as long as the costs to the government are relatively minimal, he has no difficulty with the government's putting up crèches or other religious holiday displays.[6]

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This article is a slightly revised version of remarks delivered as a response to Professor Choper's Stevens Lecture. As in my oral remarks, I will not attempt here to comment on the full range of issues addressed by Professor Choper, but instead will focus on the major theme that seems to me most problematic.

1 *See, e.g.*, Jesse H. Choper, *Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551 (1987) [hereinafter Choper, *Current Controversy*]; Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) [hereinafter Choper, *Reconciling the Conflict*]; Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963).

2 *See* Choper, *Reconciling the Conflict*, *supra* note 1, at 675.

3 *See id.*

4 *See* Choper, *Current Controversy*, *supra* note 1, at 554 (discussing Stone v. Graham, 449 U.S. 39 (1980)).

5 *See* Choper, *Reconciling the Conflict*, *supra* note 1, at 687-88 (discussing Epperson v. Arkansas, 393 U.S. 97 (1968)).

6 *See* Choper, *Current Controversy*, *supra* note 1, at 553-54. With regard to the Supreme Court's approach to such issues, see Allegheny County v. ACLU, 492 U.S. 573 (1989) (invalidating the display in a county courthouse of a crèche standing alone, while upholding the display outside a local government building of a giant Hanukkah menorah alongside a Christmas tree); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding the display of a crèche

In addressing the constitutionality under the Establishment Clause of these different forms of government action, Choper has readily conceded that the purpose underlying each is solely religious[7]—a concession that, without more, would require their invalidation under the Supreme Court's basic approach to Establishment Clause problems since at least 1963.[8] Choper has maintained, however, that these government actions do not overstep constitutional bounds because they are not, in his judgment, likely to impair religious liberty.

In light of Choper's prior writings, it hardly comes as a surprise to find him arguing in the lead article to this symposium for relatively relaxed judicial review of laws deliberately advantaging mainstream religions.[9] The defense that Choper offers here for his position, however, is novel: a defense predicated on differences that he perceives between laws intentionally favoring mainstream religions and ones intentionally favoring the racial majority. According to Choper, "there are significant differences between race and religion when deliberate *advantage* is at issue. These distinctions are sufficient to warrant contrasting constitutional treatment."[10]

I hope to demonstrate in this article the unpersuasiveness of this defense. Before turning to the particulars of the defense, however, I probably, in the interest of candor, should make clear the basic skepticism with which I approach it. Much as I admire Choper's willingness to stand by a position that he deems correct in the face of substantial Supreme Court precedent to the contrary, nothing that he has said to date persuades me that his position merits adoption. In my view, he

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as part of a city's annual Christmas display, which also consisted of, among other things, a Santa Claus house, reindeer, and cut-out figures of a teddy bear and clown).

7 *See supra* notes 4-6.

8 In Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), the Court announced a two-part test for constitutionality under the Establishment Clause, and one part was that "there must be a secular legislative purpose." The Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), added a third requirement to the *Schempp* test without altering the original two. Although the Court has not been entirely consistent in its explanations of the secular purpose requirement, it seems clear that the Court will not strike down a law for failure to meet this requirement unless the law is proven to rest exclusively or almost exclusively on religious purposes. *See* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 909 & n.24 (1987).

9 Choper devotes little attention in this article to laws deliberately advantaging minority religions because he regards it as largely noncontroversial that such laws should receive relatively relaxed review. *See* Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 504-05 (1994). I would apply the same rigorous review to laws intentionally favoring minority religions as I would apply to ones intentionally favoring mainstream religions. *See* Simson, *supra* note 8. I agree, however, that laws intentionally favoring minority religions tend to be less problematic than ones intentionally favoring mainstream religions, because they more commonly take the form of exemptions from generally applicable laws that, if applied to those exempted, would impose a substantial burden on religious liberty.

10 Choper, *supra* note 9, at 501.

assigns far too little importance to government sponsorship of religion—one of the principal evils that, according to the Supreme Court[11] and many commentators,[12] the Establishment Clause was intended to provide protection against.[13] I also believe that he fails to appreciate the special threat posed by laws intentionally advantaging religion as "step[s] that could lead"[14] to the ultimate evil of a governmentally established religion. Indeed, not only do I agree with the Supreme Court that laws based solely on a purpose of favoring religion should, without more, be struck down; I also believe that any law that would not have been adopted but for a religious purpose should be struck down, whether or not that purpose was exclusive or even primary.[15]

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11 *See Lemon*, 403 U.S. at 612.

12 *See, e.g.*, Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Simson, *supra* note 8; William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

13 As indicated by Choper's discussion here of government financial support of religion, as well as by his characterization elsewhere of such support as an impairment of religious freedom, he expressly assigns much more significance to this commonly cited Establishment Clause evil than he does to sponsorship. *See* Choper, *supra* note 9, at 512-13; *supra* notes 2-3 and accompanying text. His treatment of parochial school aid, however, suggests that, as a practical matter, the difference in his express approaches to sponsorship and financial support of religion generally may be of little consequence. *See* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260 (1968) (aid to parochial schools should not be regarded as government financial support of religion as long as the amount awarded does not exceed the value of the secular services provided by the schools). *See also* Choper, *Reconciling the Conflict*, *supra* note 1, at 679-80 (acknowledging in 1980 that under his approach to parochial school aid "all of the many aid programs to elementary and secondary parochial schools that the Court has invalidated since 1971 would have probably survived constitutional challenge"). For Establishment Clause analyses much less permissive of parochial school aid, see Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Simson, *supra* note 8.

14 *Lemon*, 403 U.S. at 612.

15 *See* Simson, *supra* note 8, at 908-11. *See also id.* at 922-23 (suggesting that the effects prong of the *Lemon* test is best understood as a means of weeding out laws that there is good reason to suspect are based on a religious purpose). As discussed in *id.* at 913-15, I believe that certain "religious" purposes do not provide a basis for invalidation under the Establishment Clause because of their relationship to the requirements of the First Amendment's Free Exercise Clause. Moreover, I should note in this regard that I believe that the Free Exercise Clause is properly interpreted to require rigorous review of substantial burdens on religious exercise that result from generally applicable laws. Though contrary to Employment Division v. Smith, 494 U.S. 872 (1990), this view is in keeping with the Supreme Court's basic approach prior to *Smith*. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1982); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). It is also in keeping with the Religious Freedom Restoration Act of 1993, which was enacted essentially to override *Smith*. *See* Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

Choper's argument in this symposium for rather relaxed review of laws intentionally favoring mainstream religions essentially consists of three steps:

> 1. Laws deliberately disadvantaging religious minorities are as disrespectful of religious minorities as laws deliberately disadvantaging racial minorities are of racial minorities. Courts therefore should treat both types of laws the same, reviewing them with the suspicion and "strict scrutiny" that laws treating people with such tangible disrespect so obviously demand.
>
> 2. Laws deliberately favoring the racial majority are as disrespectful of racial minorities as laws deliberately disadvantaging racial minorities and therefore deserve the same highly demanding level of judicial review.
>
> 3. Laws deliberately favoring mainstream religions are plainly not as disrespectful of religious minorities as laws deliberately favoring the racial majority are of racial minorities. Courts therefore should take a considerably more indulgent approach to laws deliberately favoring mainstream religions than the strict scrutiny approach that laws favoring the racial majority are most sensibly understood to require.[16]

I believe that this argument rests, implicitly or explicitly, on three questionable assumptions that, taken together, deprive the argument of any significant force.

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16 As I have indicated, Choper compares laws favoring the racial majority with ones favoring mainstream religions. In the lecture upon which his article is based, he explained that he made the comparison to mainstream religions rather than to the majority religion because in the United States "there is no majority religion." Text of Stevens Lecture at p. 5. One consequence of making the comparison as he does is that he implicitly and, I think, anomalously treats Judaism—a religion shared by less than three percent of the United States population, *see* AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH YEAR BOOK 1992, at 144 (1992)—as somehow on a par in terms of societal dominance or "in"-ness with the racial majority. *See* Choper, *supra* note 9, at 501 n.76 (characterizing Judaism as a mainstream religion).

In my view, drawing the comparison to "mainstream religions" needlessly confuses the issue. First of all, it is not clear that there is no majority religion in the United States. Although it is undoubtedly inappropriate for certain purposes to speak of Christianity as a single religion, I question whether it is inappropriate to speak of Christianity in this way for purposes of the present discussion. As exemplified perhaps most clearly by controversies over crèches funded by the government or on government property, it is not uncommon for laws favoring religion to endorse religious beliefs shared across the divisions of Christianity.

Second and more basically, rather than draw the comparison to mainstream religions or the majority religion, Choper most logically and easily could draw it to majoritarian religious beliefs. Whether or not it is appropriate in this context to speak of Christianity as the majority religion, there plainly are majoritarian religious beliefs in the United States—ones that run through various, if not all, divisions of Christianity as well as, at times, Judaism and other religions.

Assumption A: The special concern under the Equal Protection Clause with laws deliberately disadvantaging racial minorities is based on the degree of disrespect communicated by such laws.

Though questionable, this assumption is substantially more defensible than the other two that I will examine. For that reason, and because a full-scale examination of the validity of the assumption would take me far afield for present purposes, I am content for now simply to highlight that the assumption is open to reasonable debate.

The history of the adoption of the Equal Protection Clause indicates quite clearly that its framers viewed laws deliberately disadvantaging blacks with special concern.[17] Not nearly as clear, however, is what feature or features of these laws gave rise to this special concern—a question of vital importance to determining the extent, if any, to which this special concern should (for purposes of interpreting the Equal Protection Clause) be understood as extending beyond racial classifications to classifications of other sorts. At least implicitly, Choper's answer to this question is that the framers' special concern with laws deliberately disadvantaging blacks was rooted in the gross disrespect that such laws show to blacks.

Choper is not alone in offering this answer,[18] but various people have suggested, expressly or implicitly, that the question should be answered quite differently. Some have suggested, for example, that the special concern with racial classifications reflected in substantial part an objection to disadvantaging people on the basis of an unchangeable characteristic,[19] while others have taken the view that this concern was prompted solely by the distinctive history of racial discrimination in the United States.[20] As indicated elsewhere,[21] my own view is that the special concern with racial classifications was grounded in suspicion of the fairness and objectivity of the legislative process—a process dominated by whites not only in terms of actual representation on legislatures but also in terms of capacity to influence lawmaking bodies. The Supreme Court has not spoken clearly with regard to the source or sources of this special concern, seemingly suggesting

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17 *See* McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

18 *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

19 *See, e.g.*, Samuel T. Perkins & Arthur J. Silverstein, Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 576 (1973).

20 *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting).

21 Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

different answers at different times.[22] In short, without canvassing further the range of answers offered, it should be apparent that Choper's answer, though not patently ill-founded, is hardly noncontroversial.

Assumption B: Laws deliberately favoring mainstream religions are plainly not as disrespectful of religious minorities as laws deliberately favoring the racial majority are of racial minorities.

In effect, the principal support that Choper offers for this assumption is his intuitive judgment, but he also appears to offer two somewhat distinct arguments. First, the religious beliefs deliberately favored by law tend to be so "appealing" or "wholesome" that nonadherents of the favored religion often do not regard laws deliberately favoring religion as communicating to them any sort of message of disrespect.[23] Second, "our heritage" affirms that religion is such an inherently good thing that it is illogical to think that intentional government favoring of religion could take on for nonadherents of the favored religion anything approximating the type of ugly visage that intentional government favoring of the racial majority no doubt takes on for racial minorities.[24]

As an initial matter, I at least would like to raise the question of whether courts should be willing to act on the type of qualitative judgment made by Assumption B absent some empirical support for the judgment made. Assuming, however, that that objection is not dispositive, I would argue that if, as Choper at least implicitly suggests, intuitive judgment is the key, his intuition is simply wrong. From my perspective, the two sets of laws at issue generally seem about equally effective at communicating disrespect. Indeed, given Choper's recognition at the start of his article that race and religious belief "have been the object of public (and private) stereotyping, stigma, subordination, and persecution in strikingly similar ways,"[25] I have some difficulty understanding why his intuition on this matter is as different from mine as it is.

I think the explanation lies in the two arguments that I identify above as offered in support of his judgment—arguments that I find fundamentally and similarly flawed. For so many people, and I include myself in the group, religion is a source of many good things—insight, guidance, inspiration, comfort, and more. As a result of these

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22 *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); Plyler v. Doe, 457 U.S. 202, 216-17 n.14 (1982); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

23 *See* Choper, *supra* note 9, at 502.

24 *See id.* It is not entirely clear whether in making these two arguments Choper is discussing nonadherents' actual perceptions or, instead, the perceptions that nonadherents most reasonably would have. My rendition of the arguments assumes the former, but my criticisms are essentially the same regardless.

25 *Id.* at 502.

many positive associations, however, it is very easy and natural to underestimate the harmful effects that religion can have when the hand of the state is placed behind it. Choper's two arguments for Assumption B seem to epitomize this mindset. He is so focused on the positive aspects of religion that he fails to take seriously how effective government sponsorship of religion can be at inflicting a feeling of second-class citizenship on people who adhere either to religions other than the favored one or to no religion at all. However benevolent the government's motives may be, its putting its stamp of approval on a particular religion or religious belief communicates to nonadherents a message of very basic disrespect—a message that they are less than full members of the political community.[26] I can not say for certain that this message is every bit as disrespectful as the message sent to racial minorities by laws intentionally favoring the racial majority. I am confident, however, that any difference is much less pronounced than Choper suggests.

Assumption C: The fact that laws deliberately favoring mainstream religions are plainly not as disrespectful of religious minorities as laws deliberately favoring the racial majority are of racial minorities indicates that courts should review laws of the former type with much less rigor than laws of the latter variety.

Even assuming, for purposes of argument, that Assumptions A and B are valid, Assumption C almost certainly is not. Its primary defect is that it fails to take account of the fact that the principal constitutional objection to laws deliberately favoring the racial majority is based on the Equal Protection Clause while the principal constitutional objection to laws deliberately favoring mainstream religions is based on the Establishment Clause. In interpreting different constitutional provisions, courts sensibly recognize that different provisions reflect different concerns and tailor their approach to each provision to the particular concerns that prompted its adoption. Even if one assumes that the intensity of review *under the Equal Protection Clause* should vary according to the degree of disrespect communicated by the law under review, it does not follow that the intensity of review *under the Establishment Clause* should vary according to how the law under review compares in degree of disrespect communicated to laws given the most intense equal protection review. It would only follow if the Establishment Clause is as fully rooted as the Equal Protection Clause in a concern for the disrespect communicated by laws, and by all indications, it is not.

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26 *See* Allegheny County v. ACLU, 492 U.S. 573, 592-94 (1989); Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring); Simson, *supra* note 8, at 916; Van Alstyne, *supra* note 12, at 782, 787.

The language[27] and history[28] of the Establishment Clause underline its framers' concern with laws that threaten to lead a step at a time to an established religion and to all the persecution and intolerance that such establishments typically entailed. Although the clause may be partly rooted in a concern for the disrespect communicated to nonadherents of a favored religion, the evils at which it took aim in order to avoid movement toward the ultimate evil of an established religion were considerably broader than that. As the Supreme Court succinctly and, I believe, accurately described them, these evils primarily include "sponsorship, financial support, and active involvement of the sovereign in religious activity."[29] In keeping with this understanding of the clause's roots, the intensity of judicial review under the clause should vary not according to the degree of disrespect communicated by the law under review, but instead according to the extent to which the law implicates any of the three evils identified by the Court.[30]

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27 *See* U.S. CONST. amend. I ("Congress shall make no law *respecting* an establishment of religion") (emphasis added); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

28 *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947); Edmond Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U. L. REV. 1274 (1961); Van Alstyne, *supra* note 12.

29 Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). *See also Lemon*, 403 U.S. at 612 (quoting *Walz*).

30 *See* Simson, *supra* note 8, at 911, 915-16.

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A RESPONSE TO PROFESSOR CHOPER: LAYING DOWN ANOTHER LADDER

Sheri Lynn Johnson†

Professor Simson has commented on Professor Choper's Establishment Clause approach, so I will confine my remarks to the free exercise section of Choper's lecture.[1] Choper described his intent as twofold: primarily to outline an approach to the Religion Clauses and secondarily, to contrast the religion cases with equal protection doctrine.[2] I think it is clear that he undertakes the contrast in order to *defend* his approach against doctrinal arguments that arise from equal protection parallels.

I have no quarrel with his free exercise approach standing alone. Indeed, I think I would applaud the results in almost any free exercise case I can imagine. I am no happier than he is at the Court's introduction of an intent requirement into the free exercise case law. Nevertheless, I am disturbed by Choper's remarks. The contrast he develops between race discrimination and free exercise claims risks further damage to race discrimination claims by bolstering the Court's present approach to the intent-effect distinction in race discrimination claims.

Regarding the intent-effect distinction, Choper starts by noting that actions intended to disadvantage either a racial or religious group are both properly subject to exacting scrutiny, but that the Court has declined to give anything but the most deferential review to race-neutral laws that have disproportionately advantaging effects on racial minorities.[3] Although he first hedges on whether or not this interpretation of the Equal Protection Clause is correct[4] he quickly adds that " 'generally applicable religion-neutral laws that have the effect of burdening a particular religious practice' are *more threatening* to

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1 Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994). I would also take issue with Choper's description of affirmative action—but will not do so here.

2 *Id.* at 491.

3 *Id.* at 508.

4 *Id.* In his response to questions, Choper acknowledged that he would be "less than candid" if he did not admit that he was inclined toward the view that disadvantaging race neutral laws should not be afforded heightened scrutiny. Jesse H. Choper, Address at the Cornell Annual Robert S. Stevens Lecture Series (Sept. 8, 1993).

constitutional values than government action that has a disproportionate impact on minority racial groups."[5]

It is here that we part company. For reasons I will shortly address, I would prefer to avoid any such hierarchical comparisons of constitutional wrongs. First, however, I would note that the reasoning Professor Choper offers to support his judgment of which disparate effects more threaten constitutional values is persuasive only to one already persuaded.

Professor Choper argues that unintentionally burdening a religious practice is more offensive than unintentionally burdening a minority racial group.[6] He contends that race neutral laws do not injure members of minority racial groups "because of" their race, whereas religion neutral laws that burden a particular religious practice *do* injure persons "because of" their religion.[7] I have two objections to this analysis.

First, I think that race-neutral laws often *do* injure "because of" race. When a decisionmaker—whether a legislator, a judge or a juror—acts with unconscious racial bias, such actions would generally be labeled "race-neutral" under present law,[8] yet to my mind they are clearly made "because of" race. Or a decisionmaker's choices may reflect selective indifference[9] to a racial outgroup; a legislator might be undeterred by the negative effects on a racial minority of otherwise desirable legislation when she would be deterred were those effects visited on her own racial group. Here too I think it fair to say that the loser lost "because of" her race.[10]

Moreover, even in the situation Choper seems to think is more typical—where the racially disproportionate impact is completely untouched by racial considerations on the part of the decisionmaker—I think the person of color *is* disadvantaged "because of" her race. Choper argues that the person of color is harmed not "because of" her race but *only "because the minority group members are disproportionately represented in the larger group affected."*[11] I think it is snapshot history to say that such persons do not suffer adverse consequences "because of"

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5 Choper, *supra* note 1, at 508 (quoting Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 886 n.3 (1990)) (emphasis added).

6 *Id.* at 509.

7 *Id.*

8 *See generally* Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the relationship between the unconscious and racially discriminatory practices).

9 *See* Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

10 Thus I disagree with Choper's assertions that inquiry into the motivations of lawmakers is a "manageable task" and that intentional racial discrimination "will ordinarily be fairly clear." Choper, *supra* note 1, at 496.

11 *Id.* at 508 (emphasis added).

their race. As Professor Choper himself pointed out, the "larger group affected" often is the poor, or the poorly educated. With a less restricted time frame, it is clear that many African Americans and other racial minorities *are poor* because of their race and thus they *are* disadvantaged "because of" their race by legislation that adversely affects the poor or poorly educated. That this disadvantage does not happen all at once does not mean that it is not attributable to race.

I suspect that Choper might respond that a significant difference remains, for he also claims that religion-neutral laws that burden a particular practice constitute "because of" discrimination in that "*all persons who suffer the special operative consequences adverse to their belief system* are necessarily members of that religion and all members of that religion suffer the special operative adverse consequences."[12] The implication is that the same could not be said for disadvantaging race neutral laws; generally, not all members of a racial minority are disadvantaged and not all persons disadvantaged by the legislation are members of the minority group.

But the distinction created by the set of exclusive sets Choper has constructed is a sleight of hand. Of course, only persons with the religious belief in question will "*suffer . . . consequences adverse to their belief system*";[13] this is so by definition. Other persons, however, *will suffer from the operation of the statute.* Unless I misunderstand the peyote example, *many* other persons will suffer from not being able to use the peyote they desire. Moreover, I suppose that in many cases, some members of the religious group would suffer *no* disadvantaging effects; their age, gender, status or occupation would exempt them from the conflict between religious duties and secular advantage that others in the religious group would face. Finally, some persons of the disadvantaged religious group who do suffer under the statute will not suffer *religious* consequences. Perhaps they will choose to go to jail or leave the country, thus making choices and suffering consequences very similar to those of some nonreligious peyote users. That the religious person can be said to suffer those consequences for a different reason, that is, her religious beliefs, does not differentiate the two kinds of disparate effects. The person of color who suffers under a statute that disadvantages the poorly educated can be said to suffer "for a different reason," that is, the history of racial discrimination that deprived her of a decent education, than does the white person disadvantaged by that statute. Thus I am not persuaded that religion-disadvantaging effects are more "because of" than are race-disadvantaging effects.

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12 *Id.* at 509 (emphasis added).

13 *Id.* (emphasis added).

The second reason I am not persuaded by the "because of" distinction Choper utilizes to place free exercise "effects" on a different footing than racially disparate effects is my view that "because of" discrimination provides a too limited vision of the goal of equality embodied in the Fourteenth Amendment. It seems to me that the Fourteenth Amendment is best read to have a cluster of objectives, which include but are not limited to "because of" race discrimination. This is a much larger topic, about which others have written extensively, so I will simply say that I would not prioritize "because of" discrimination as the central meaning of the Fourteenth Amendment. From the victim's perspective, effects are of far greater importance than intent.[14] Regardless of whose perspective is adopted, some particular effects are of great importance; certainly subordination, stigma, second class citizenship, and prejudice are among the evils that must be eradicated before racial equality is possible.[15]

Thus, I reject this comparison between effects on race and religion both because it is unpersuasive and because it presumes the paramountcy of "because of" discrimination as the focus of the Fourteenth Amendment. I also would abjure such a comparison as counterproductive. It reminds me of a related discussion that I have every year with my constitutional law class *comparing* the reasons for treating race as suspect with the reasons for treating gender as suspect. This discussion all too often degenerates into a fierce "which is worse?" argument. Unfortunately, such wars of gender rights versus race rights are not limited to first year students.[16]

In any such competition among oppressed groups, whether between racial and religious minorities or between racial minorities and white women, much can be said for either side. But saying it tends to make combatants out of natural allies and distracts us from common interests. I doubt that such jockeying for position is likely to increase the level of protection for either oppressed group. Struggles for the higher rung only legitimate the ladder; here too, it is time to lay the ladder down.[17]

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14 *See generally* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978) (examining disadvantages in employment, education, and housing which do not violate antidiscrimination law).

15 *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 941-46 (1989) (reviewing various conceptions of discrimination and citing their proponents).

16 For a recent hair-raising example, see Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992).

17 "We cannot exploit, or neglect, any particular set of individuals and expect our global human community to thrive . . . . When we keep the whole in mind, we have laid the ladder down." BETTY JEAN CRAIGE, LAYING THE LADDER DOWN: THE EMERGENCE OF CULTURAL HOLISM 116 (1992).

Still, I wish to reiterate that I am sympathetic to Choper's desire to gain protection for religious practices impeded by neutral statutes. I understand his desire not to have the intent-effect distinction—which *is* well established in race doctrine, although I hope not permanently—to be transplanted into free exercise doctrine. I just wish he would proceed in a way that did not further entrench what I consider to be wrongheaded thinking about racially disparate effects. I wonder if instead of arguing whether religion-disadvantaging effects or racially disparate effects are worse (or which more closely resemble "because of" discrimination), Choper might reformulate his argument to trace how the effects are simply *different*.[18]

They are different in the kind of harm they threaten, rather than the degree of a single kind of harm. It seems to me that in assessing racially disparate effects we are most concerned with distributive justice, while with respect to effects on religious practice we are most concerned with coercing beliefs. Although persons may suffer economic losses for religious beliefs, and persons may be pressured to "pass" to escape various racial effects, the primary concerns in these two areas are sharply different. These different animating concerns to me would be reason enough to unhook the two analyses—and would render unnecessary comparisons between the *severity* of the threat posed to constitutional values by statutes neutral-but-disadvantaging to race and religion.

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18 *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms)*, 1991 DUKE L.J. 397, for an example of such an argument.

Suburban Taxes Are Higher For Blacks, Analysis Shows

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By DIANA JEAN SCHEMO

Special to The New York Times

GARDEN CITY, L.I., Aug. 16 — During the 1980's, increasing numbers of blacks attained that most potent symbol of the American dream: a home in the suburbs. But in many suburban areas, an analysis of census data suggests, black homeowners are paying higher property taxes than whites on homes of similar value.

The analysis, done by Prof. Andrew A. Beveridge of Queens College, looked at 30 cities and 31 suburbs and found that black homeowners are taxed more than whites on comparable homes in 58 percent of the suburban regions and 30 percent of the cities.

In the New York region, the disparity was common on Long Island and in New Jersey. It was also prevalent in the suburbs of Chicago, San Francisco, Los Angeles and eight other cities.

The disparities range from property tax bills that were 47 percent higher, or $412 a year more, for blacks in the Philadelphia suburbs to 3.3 percent, or $38 more, in the Dallas-Fort Worth suburbs.

Sociologists, politicians and tax experts said they did not think that the disparities stemmed from deliberate racism by the taxing jurisdictions or tax assessors. Rather, they said, the differences probably resulted from several related trends. One is the flight of businesses from some suburbs as black homeowners move in and whites leave, saddling newcomers and those who stay behind, including whites, with a heavier tax burden. Another is pressure on governments by wealthier, long-term homeowners not to reassess properties in a timely fashion, leaving a higher tax burden for newer homeowners, a group that tends to includes blacks.

Dr. Beveridge's findings were based on the responses of blacks and whites who were asked by the Census for the market value of their homes and the property taxes they paid in 1990.

Because the analysis depends on homeowners' subjective estimates of their homes' value, it may be less reliable than more conventional studies of tax inequities that rely on data from actual home sales. But the findings are consistent with those of other researchers who have used sales data to look at selected communities, and the census data provides a broader picture, allowing comparisons between regions across the country.

Dr. Beveridge's analysis, conducted for The New York Times, was inconclusive when looking at property taxes in major cities. It found that while blacks paid higher taxes on comparable homes in nine cities, whites paid higher taxes in seven. In New York, blacks paid taxes at a rate 66 percent higher than for whites in Manhattan and 10.7 percent higher in Brooklyn, but when taxes on homes in the three other boroughs were included, the differences citywide were no longer statistically significant. In 13 other cities, as well, no significant differences appeared.

But a pattern of inequity emerged in the suburbs. In 18 of 31 suburbs, blacks were taxed significantly more than whites for comparable homes. In a dozen suburbs there was no statistically significant difference, and only in suburban Miami did whites pay significantly more. Dr. Beveridge said that since the study did not break out data on Hispanic homeowners, who can identify themselves as white or black on the Census, the results in the Miami suburbs might be skewed by the recent migration of Hispanic people there.

Adding to Hardships In Move to Suburbs

After reviewing the study's findings, Billy J. Tidwell, the National Urban League's director of research, said the tax disparities compounded hardships he has documented as blacks move to the suburbs. They include difficulties obtaining mortgages and racial steering away from white neighborhoods.

"We are talking about fundamental bread and butter racial issues," he said. "It appears we have a long way to go, perhaps longer than we had recognized."

Dr. Beveridge, the director of the Program for Applied Social Research at Queens College, said the data sharpened an emerging picture of the obstacles many blacks face as they join the middle class.

"It means that if one of the routes in the U.S.A. to middle class status has been to move to the suburbs and live a comfortable suburban life style, trying to achieve that is going to cost more for blacks," he said.

In the 1980's, according to the census, the number of blacks living in the suburbs rose to 1 in 3, from 1 in 4.

For much of the decade, housing values skyrocketed as voters were swept up in a populist, anti-tax wave. On the real-estate front, that mood translated into pressure against frequent reassessments to reflect increasing values. Voters reasoned that while the values of their homes may have been rising, their incomes were not.

To Newcomers: 'Welcome, Stranger'

As a result, a number of jurisdictions — though none in New York State — now raise property-tax assessments only on a house's sale. The practice, sometimes nicknamed "Welcome, stranger," and illustrated most pointedly in California's Proposition 13, rewards long-term residents with lower tax bills and places a greater tax burden on newcomers of all races.

"In central cities or the rings around them, white-occupied housing has increased in value more than housing in areas of black concentration, and the assessed valuations have failed to keep pace," said George E. Peterson, a specialist in taxation and government finance at the Urban Institute in Washington. "As a result, the ratio of taxes to property value tends to be higher in black neighborhoods, and in poorer neighborhoods in general."

James F. Dunne, property tax research director at the New York State Board of Equalization, said such disparities were an inevitable result of political pressure from white homeowners not to reassess their properties.

Fair assessments require "keeping current with the market," he said, adding, "you can't have equity if you don't do that."

In New York, unlike many states, he noted, the courts have avoided ordering jurisdictions to update assessments, and state law does not specify that assessments must be based on what experts agree is the only fair basis — the market value of a house. "It all originates in New York with the local control and home rule tradition," said Mr. Dunne. "There's resistance to a single uniform state standard that makes sense."

Anne Aubrey, a spokeswoman for the International Association of Assessing Officers, said tax assessors were not to blame. "The assessor's role is to establish values according to the rules provided in law," she said. "If the rules are bad, then the values may not be equitable."

In addition, some tax experts said, either because of limited finances, white flight or a tendency among real-estate agents to steer blacks into racially mixed areas, suburban blacks often end up in communities with declining tax bases. Those towns have little recourse but to tax property at a higher rate to finance schools, police, garbage collection and other services.

John R. Logan, a sociologist at the State University of New York at Albany, studied 840 suburbs across America. He found that homeowners in white areas were taxed at 82 cents per $100 of assessed value, while those in black areas were taxed at $1.16 per $100 — a 42 percent difference.

Mr. Logan's research focused on distinctly black and white taxing jurisdictions; he defined black suburbs as those where blacks accounted for more than 15 percent of the population, while white suburbs were those with 95 percent white residents. That meant that taxing authorities had to raise revenue within racially defined areas.

Dr. Beveridge, however, found the inequities in places with a variety of taxing systems, including black neighborhoods that are part of white jurisdictions.

"I've been sure for a long time that blacks lived in communities that had

Study Based on Census Questionnaire

The study of property taxes by Prof. Andrew A. Beveridge was based on the answers given by homeowners in the nation's most populous 30 metropolitan areas to the following questions:

"What is the value of this property; that is, how much do you think this house and lot or condominium unit would sell for if it were for sale?"

"What were the real-estate taxes on this property last year?"

Answers to the first question were given in price ranges. Answers to the second were given in exact dollar amounts.

Dr. Beveridge calculated an estimated tax rate for each house, dividing the amount of taxes paid by the midpoint of the home's price range. Homes valued at more than $500,000 were excluded.

He then compared the estimated tax rates of blacks and whites, using standard statistical tests to determine whether the differences in each geographical area were statistically significant.

The study used data from the 1990 Census; which consist of a 5 percent sample of all respondents.

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higher tax rates and offered less to residents in terms of services, especially schools," Mr. Logan said. "The data you're showing, of disparities within the same taxing jurisdictions, show there's another layer of disadvantage."

Those With Less Pay More on L.I.

An examination of property taxes on Long Island, using data from the Realtors Multiple Listing Service, showed individual examples of those who have less paying more. A home that sold for $141,000 last September on East Pennywood Avenue in Roosevelt, which is predominantly black, had a tax bill of $5,750, while another on a lot twice as big on Fifth Street in the nearby affluent village of Garden City, which is almost all white, that sold for $440,000 had a tax bill of $2,696.

Officials in Nassau County, which successfully challenged a court order to reassess all residential properties, defend their method of assessing, which uses an unusual formula based on construction costs in 1938 and land costs in 1964, as protecting the county's tax base from wild fluctuations in the real-estate market.

Abe Seldin, the Nassau County assessor, said he did not believe the assessments penalized black homeowners, adding that taxpayers who believe they are being overcharged can always challenge their assessments in small claims court.

But Justice Leo McGinity of the State Supreme Court, who originally ordered Nassau to reassess, said individual challenges do not address basic problems in the system. He criticized the county's "subtle shifting of responsibility to maintain an equitable system of assessment" to taxpayers.

"There's a political agenda not to do anything about this," she said. "There's a feeling in politics that the wealthier you are and the whiter you are, the more likely you are to vote. So you don't want to alienate the white voters, because if you reassess and you reduce the assessments in the African-American areas, then obviously the assessments in the Caucasian areas are going to go up. The politicians have decided that's hazardous to your political health."

Several black homeowners on Long Island said they were not surprised by Dr. Beveridge's findings. "In many, many situations in this country, racism is alive and well," said Carolyn Coates, a black resident of Wyandanch who runs a religious bookstore. Ms. Coates had successfully challenged her property tax bill of $2,400 on her three-bedroom ranch house, and reduced it by the maximum 25 percent to $1,800. The next year, she received the same $2,400 tax bill, and had to make her case all over again. "I felt it all the way around: the food I had to buy, my car insurance, clothing," she said.

Larry McCord, an aide to David Bishop, a Suffolk County legislator, has also had to challenge the taxes on his Wyandanch home each year, since his town's tax system typically does not incorporate earlier judgments in calculating each year's taxes. It took him more than four years to reduce his tax assessment from a $250,000 market value to $107,000. The difference is a tax bill that is $2,700 instead of $6,000.

"What's troubling is in 10 years I've paid $15,000 too much that I know of," he calculated. "I've got a daughter going to college in September. That's one year of law school tuition."

Deepak Bhargava, a spokesman for the Association of Community Organizations for Reform Now, a nonprofit housing group based in Washington, said he did not believe the higher taxes were the result of "outright, direct discrimination," but a reflection of the balance of power in suburbs, where blacks, as newcomers, are less organized.

"To the extent that property taxes are higher for minorities, it would impair people's abilities to become homeowners, and it clearly would be something that would eat into equity in minority communities," he said. "So clearly, it would be an impediment to advancement."

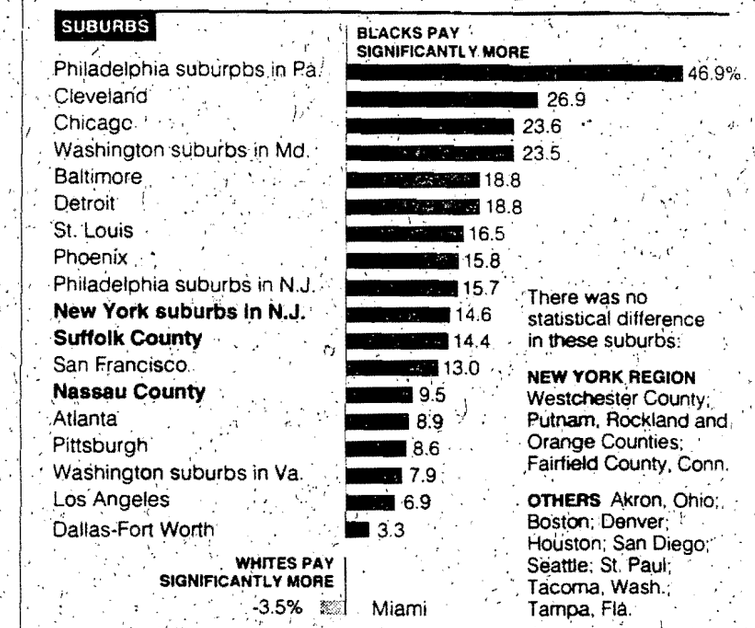
For Mr. McCord, examining the inequalities of the suburban tax system reminded him of his first glimpse of the track at a white high school in the segregated South, where he grew up. There, he saw hurdles that gave way when struck and then bounced back after the white runners had passed. In his school, the parents had made the wooden hurdles themselves. When those hurdles were struck, it was more often the runner who fell to the ground.

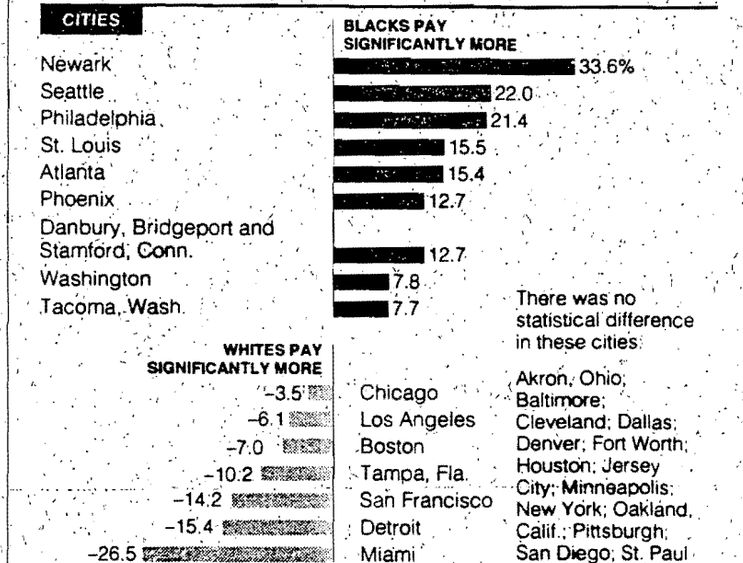
Somehow, the bruises hurt more after his visit to the white school, Mr. McCord recalled. "If you didn't know what you weren't getting, there's no way you can complain," he said, rubbing his knees at the memory.

A CLOSER LOOK

Who Pays More, and Where

Percentage differences in estimated property-tax rates.





Source: Dr. Andrew A. Beveridge, Sociology Department, Queens College, from Census data

MEMORIES LAST A LIFETIME: GIVE TO THE FRESH AIR FUND

Adding Diversity to the Bench

In Selecting Nominees for Federal Judgeships, President Clinton Is Fulfilling His Promise to Push for Ethnic and Gender Balance

By Naftali Bendavid

A novel sight greeted Senate Judiciary Committee members at a Nov. 16 hearing: Of six judicial nominees lined up before them, three were African-American men, two were white women, and one was a Jewish man.

Unaccustomed to such an array during the past 12 years, Sen. Dennis DeConcini (D-Ariz.) asked a question that seemed oddly out of place: Do any of you belong to clubs that discriminate on the basis of race, sex, or religion?

That query, of course, became routine during the great judiciary battles of the Reagan-Bush epoch, when liberal activists tried to embarrass nominees that they considered insensitive to social and racial inequities.

DeConcini's question, so standard a year ago yet so anachronistic today, captures the suddenness and magnitude of the change President Bill Clinton is beginning to wreak on the nation's 846 federal judgeships.

The Clinton judges—he has nominated 48, including Justice Ruth Bader Ginsburg, and 28 of those have been confirmed—differ in many ways from those placed on the bench by Ronald Reagan and George Bush. They've spent more time in public service. They've made less money. They tend to be liberal.

But the most striking difference is their racial and gender mix.

New Benchmark

Diversity has been a theme of Clinton's since he was a candidate. In an administration that has sometimes seemed to lack basic principles, diversity has become a defining characteristic.

Sheldon Goldman: Clinton judges will be a benchmark for diversity.

So it is with judge-picking.

Just two of the 44 judges Reagan named during his first year were minorities or women, as were six of Bush's 23 first-year nominees. In contrast, fully 29 of Clinton's 48 candidates are women or minorities, according to a draft of a report being prepared by the Alliance for Justice, a left-leaning group that monitors judicial nominees.

"This will undoubtedly be the benchmark against which all future administrations will be judged," says Sheldon Goldman, a political-science professor at the University of Massachusetts at Amherst who has written extensively about judge-picking. "This tremendous push toward ethnic and gender diversity could break all historic records."

Indeed, Clinton already has placed 11 African-Americans on the bench, three more than Reagan named in his entire eight years.

But Clinton's judges are set apart by more than race and gender. It seems that a new generation, fresh from its conquest of the presidency, is beginning to invade federal courtrooms.

One new Massachusetts district judge, 49-year-old Richard Stearns, worked on Eugene McCarthy's 1968 presidential campaign. Another Massachusetts judge, Reginald Lindsey, 48, volunteered in Lyndon Johnson's 1964 effort. Peter Messitte, 52, who just became a Maryland district judge, spent from 1966 to 1968 in Brazil with the Peace Corps.

Pick of the Democratic Litter

Clinton has the luxury of picking from a pool of Democratic lawyers and state judges who've spent 12 years waiting their turn for a shot at a federal judgeship. "They [the Republican administrations] were picking at the bottom of the barrel, and we're picking at the top," one senior administration official observes.

Most Clinton judges have worked in public service. Many have been lawyers for the poor—in legal-services offices and public defender's shops or as community volunteers. If Bush's typical nominee was a partner in a big law firm, Clinton's is a state judge who was previously a public defender or prosecutor.

"We don't have litmus tests or judicial-philosophy tests," says Assistant Attorney General Eleanor Acheson, who heads the Justice Department's judge-screening team. "But I do think we've put people on the bench who are interested in people and their problems, in being rigorously fair-minded, in making the court an open and accessible place."

Individual stories make the point. Martha Vazquez, named by President Clinton as a judge in the U.S. District Court for the District of New Mexico, is the first Mexican-American woman on the federal bench, Acheson says. Vazquez's parents grew up in Mexico.

Most recently a partner at Santa Fe's Jones, Snead, Wertheim, Rodriguez & Wentworth, Vazquez spent three years as a public defender and worked briefly for Michigan Migrant Legal Services. Vazquez has been a member of the New Mexico State Bar's committee on minorities and of the minority caucus of the Association of Trial Lawyers of America.

Or take former Pennsylvania State Judge Donetta Ambrose, 48, elevated by Clinton to the U.S. District Court for Western District of Pennsylvania. Am-

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LOSER

Zoë Baird

If only she had missed the phone call from the White House. Zoë Baird was minding her own business as a little-known corporate lawyer when she was offered the chance to become President Bill Clinton's attorney general. When she accepted, Baird was transformed overnight into the poster child for ambitious yuppies out of touch with those Americans, so cherished by Clinton, who work hard and play by the rules. The revelations that she and her husband, a Yale Law School professor, had hired illegal aliens to do domestic work, and failed to pay their Social Security taxes, was greeted with indifference in official Washington, many of whose white-collar professionals doubtless are guilty of the same indiscretion. But the heartland sent Washington and Baird a wake-up call, rising up to register its difficulty in understanding how a $500,000-a-year corporate lawyer and her constitutional-law-scholar husband could fail to abide by a statute that millions who are less fortunate manage to comply with every day. Even Clinton seemed sorry to have put Baird through the ordeal, offering her a seat on the President's Foreign Intelligence Advisory Board as a consolation prize.

LOSER

Mark Cowan

Is Mark Cowan a victim of his own success? Although Cowan helped found The Jefferson Group and built it into one of the fastest growing and most ambitious lobbying and public-affairs shops in town, he apparently pushed too hard along the way. In September, Cowan was thrown overboard, a move accompanied by a public airing of his colleagues' gripes against him, including complaints about a lack of tact, an overly aggressive marketing technique, and a long list of staffers who had quit. Robert Carlstrom Jr., who co-founded the firm six years ago, persuaded the two other board members to fire Cowan and to name former Sen. Paul Trible (R-Va.), who had been senior vice president, as Cowan's replacement as chief executive officer. But don't cry too hard for Cowan. He landed comfortably as vice chairman for business development at Cassidy & Associates, where longtime friend James Fabiani is president and chief operating officer. Walton Chalmers, executive vice president of Cassidy, says the firm is only too eager to put Cowan's rough-edged talents to use: "We're looking forward to Mark going out and marketing us like crazy."

PHOTOCOPY PRESERVATION

Rosemary Barkett has gained a conservative senator's nod.

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brose, whose parents did not attend high school, still lives in New Kensington, Pa., where she was born. She was the first woman elected judge in her county.

"It's important that people who come to the courts see people who they can identify with on the bench," Ambrose says. "The public feels more confident. They feel the courts are more open and accessible."

Reagan-Bush nominees were criticized for having done little *pro bono* work. On Senate Judiciary Committee questionnaires, one nominee even cited as a *pro bono* contribution his donation of blood. Another mentioned coaching Little League. Others boasted of their firms' *pro bono* work, rather than their own.

In contrast, Raymond Jackson, 44, a Clinton judge in the Eastern District of Virginia, helped found the Peninsula Legal Aid Society, was an NAACP board member, coordinated *pro bono* work in his region, and for 20 years belonged to the Old Dominion Bar Association, which helps minorities and the disadvantaged. And he's not unusual among the Clinton nominees.

"We are in a diverse society, so it's good to have diversity on the bench," says Jackson, formerly an assistant U.S. attorney. "That's self-evident. You have a diversity of people coming through the court, and we need a sense that the court represents all of the people."

Clinton aides insist that embracing diversity hasn't meant abandoning quality. Says Acheson: "We're not experiencing this thing that's always implicit when people talk about diversity and excellence, that there is some tension between the two."

Still, some judicial candidates do seem to be patronage picks, as has ever been the case. M. Blane Michael, who recently became a 4th Circuit appeals judge, has long associations with West Virginia's two powerful Democratic senators, John D. Rockefeller IV and Robert Byrd.

Michael, 50, formerly a partner with Jackson & Kelly in Charleston, W. Va., ran several of Rockefeller's campaigns and served as his counsel when he was governor. Michael also chaired Byrd's 1982 and 1988 campaigns.

Critics of Clinton's nominees are divided into two camps: the president's opponents, who think the picks are too activist, and his friends, who think he's moving too slowly.

Clinton's nominees have so far avoided an all-out assault from conservatives. But Rosemary Barkett, Clinton's candidate for the 11th Circuit, shows every sign of becoming their first target.

The main rap against Barkett, a Florida Supreme Court justice: She has a soft spot for death-row inmates.

"You have case after case where she would vote to void the death penalty because of things like emotional deprivation while growing up, learning problems, societal deprivation," says Thomas Jipping, legal-affairs analyst for the conservative group Coalitions for America. "That's empathy. It's not law."

Barkett boosters say that she has upheld more than 200 death sentences. But that's only true, Jipping responds, if dozens of minor procedural rulings are counted.

As a sign of what's to come, Mark Disler, a top aide to Sen. Orrin Hatch (R-Utah), sent out packs of negative material on Barkett to reporters, asking them not to reveal where it came from—an admonition that was promptly ignored.

Acheson hints the Clinton administration will launch a pro-Barkett counterblitz.

"People are trying to get the public very excited about something that is hardly a balanced look at the woman's record," Acheson says. "We will communicate with the public at large, so people can understand how strong this person is and that the things people talk about are a tiny fraction of her work."

The job of Barkett's opponents was made tougher Dec. 17 when conservative Sen. Connie Mack (R-Fla.) endorsed her.

"I found it offensive when Judges [Robert] Bork and [Clarence] Thomas were personally vilifed by the left, when the true objection to their confirmation was based on philosophical disagreements," Mack said in a prepared statement. "It is equally offensive to me when the right mimics this behavior."

Even Clinton's friends complain that he's moving too slowly. There were 109 vacancies on the federal courts when he took office, and there are 113 now, according to the Administrative Office of the U.S. Courts.

Herman Schwartz: Most circuits have a solid Reagan majority.

Appeals Judge Stephen Reinhardt of the 9th Circuit says that one of his court's two vacancies has not been filled in more than a year.

"The quality of the judges, as far as I can tell, is better than any other president," says Reinhardt, a Carter appointee. "But quality is only important if you actually do it. I don't know what they're doing. It's beyond my comprehension. . . . Maybe we're too far from Washington. We are overloaded, and the backlog is building up."

Clinton aides answer that with 48 judicial nominees in their first year, they're moving faster than any administration in recent history.

In any case, Clinton's impact on a judiciary shaped by Republicans for 12 years will necessarily be limited. Reagan seized on the idea of using the judiciary to affect social policy directly, aggressively appointing conservative nominees who were young and unlikely to retire for decades.

Liberals hit back with tightly organized campaigns to defeat the nominees. Senate confirmation hearings became forums for fighting out social issues, ranging from civil rights to sexual harassment to criminal justice.

By the time Clinton greeted the Little Rock crowd as president-elect on Nov. 3, 1992, Reagan-Bush judges made up almost exactly 60 percent of the federal judiciary.

"In almost every circuit, you have a fairly solid, vigorous, and often ideologically oriented Reagan majority," says American University law Professor Herman Schwartz, author of *Packing the Courts*, an account of Reagan's judicial appointments.

"When you add to that the age factor—that many of the Democratic appointees are well along in years—obviously the impact of the Reagan years is very significant."

Part of that impact is a paucity of minorities. There are just 34 African-Americans district judges out of 649, and nine African-American appeals court judges out of 179, says Eric Schnapper, assistant counsel of the NAACP Legal Defense and Educational Fund.

Between them, Reagan and Bush appointed only one black appeals judge who is still on the bench, he adds.

PHILIPPE JENNEY

George Kassouf estimates that Clinton might fill 250 vacancies.

"A law firm that hired employees the way the Reagan and Bush administrations hired judges would not be allowed to visit and recruit on almost any major campus in the United States," Schnapper says. "Imagine going to Harvard and trying to tell them you've hired one black guy in 13 years."

Plenty of Vacancies

Despite the daunting majority of Reagan-Bush judges, Clinton can make at least some impact. For one thing, he took

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WINNER

Winston & Strawn

The D.C. office of Chicago's Winston & Strawn had a banner year, adding two of the most sought-after former House members and a slew of new clients as well. In January, the firm snagged former Arkansas Rep. Beryl Anthony Jr. (left), a Ways and Means Committee veteran, to head up its moribund legislative section. A week later, former Rep. Dennis Eckart (D-Ohio), an Energy and Commerce Committee alumnus, came aboard as well. Add former Reagan Transportation Secretary James Burnley IV; LaJuana Wilcher, a former assistant administrator at the Environmental Protection Agency; and Charles Kinney, a 19-year veteran congressional staffer who served as floor manager to Senate Majority Leader George Mitchell and suddenly Winston & Strawn has become one of the hottest lawyer-lobby shops in town. The best news is that the new recruits are apparently making rain. New clients include such heavyweights as the American Insurance Association, the NYNEX Corp., and the American Hospital Association.

PHOTOCOPY PRESERVATION

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office with 109 vacancies left over from Bush—a fact that frustrates conservatives no end.

And the impact could grow if Congress decides to create new federal judgeships; it created 85 new slots in each of the last two administrations. Even without that, Clinton could fill 250 vacancies by the end of his term, estimates George Kassouf, director of the Judicial Selection Project of the Alliance for Justice.

While diversity may be an admirable goal, the question remains: What impact will Clinton's judges have on the substance of the law? What difference will they actually make?

District and circuit judges, although they receive a fraction of the attention de-

Martha Daughtrey is a Clinton appointee to the 6th Circuit.

voted to the Supreme Court, decide far more cases. In 1992, District Courts decided 275,451 cases, Courts of Appeals 44,373, and the Supreme Court only 107.

The lower courts end up writing much of the law that matters, of course, deciding nitty-gritty legal questions within the broad outlines set by the Supreme Court.

Based on their previous work, it seems clear the Clinton judges will be far more liberal than their Republican colleagues—more willing to explore new areas of law, to expand access to the courts, to look favorably on discrimination claims, to restrict the power of police and prosecutors.

"If you pick the right judges in terms of diversity, they have a little greater empathy for those who struggle in life," says Sen. Paul Simon (D-Ill.), a member of the Senate Judiciary Committee. "That's an important thing."

Clinton officials are proud of their judicial record, painting it as one their big successes. After a slow start, the judge-picking machine seems firmly in place, headed by Acheson in the Justice Department and assistant presidential counsel Ronald Klain in the White House.

Clear Guidelines

Following a long tradition, district judges are recommended by the Democratic senators in each state. But Clinton has sent them clear guidelines about the kind of judges he wants—and has even rejected a few recommendations.

Simon remembers a talk given to Democratic senators by Howard Paster, then Clinton's congressional liaison. "Paster said, 'If you think you can get by with all white males, we're not going to accept that,' " Simon says.

Many argue that it is the appeals courts where a president leaves his biggest mark. Clinton has so far named five circuit judges, including Barkett and Michael.

Pierre Leval, named to the 2nd Circuit, is widely considered a superstar. Martha Craig Daughtrey, a new 6th Circuit judge, was the only woman on the Tennessee Supreme Court. Judith Rogers, a D.C. Circuit nominee, would be the first black woman named to a federal appeals court since 1980.

Judge-picking has clearly become one of the hottest and most pressurized tasks of an administration.

"Interest groups have developed big stakes in the outcomes of cases, and are very active in a way they haven't been before," says Lee Liberman, who helped run Bush's judge-picking operation, often criticized as overly ideological. "It's a pretty difficult situation. I think it's quite destructive to the notion of the rule of law."

Acheson, who has the advantage of a Congress run by her own party, is more philosophical about the pressure.

"Moses didn't come down from the mountain and say, 'This is going to be the process for judicial nominations,' " Acheson says. "It's a public process. People in the public who have views will come in and express themselves." □

Clinton's Appointments to the Federal Courts

President Clinton has nominated 47 candidates to the federal courts, not including Supreme Court Justice Ruth Bader Ginsburg. These 27 have been confirmed.

CIRCUIT JUDGES

Judge	Court	Age	Law School	Previous Job	Net Worth
Martha Daughtry	6th Circuit	51	Vanderbilt	State Supreme Court Justice	$833,215
Pierre Leval	2nd Circuit	57	Harvard	U.S. District Judge	$4,295,000
M. Blane Michael	4th Circuit	50	NYU	Jackson & Kelly (Charleston, W.Va.)	$545,900

DISTRICT JUDGES

Judge	Court	Age	Law School	Previous Job	Net Worth
Henry Adams	Middle Fla.	48	Howard	State Circuit Court Judge	$207,571
Donetta Ambrose	W. Pa.	48	Duquesne	County Court Judge	$707,914
Harry Barnes	W. Ark.	61	Arkansas	State Circuit Court Judge	$622,834
Leonie Brinkema	E. Va.	49	Cornell	U.S. Magistrate Judge	$300,024
Susan Bucklew	Middle Fla.	51	Stetson	State Circuit Court Judge	$731,265
Deborah Chasanow	Md.	45	Stanford	U.S. Magistrate Judge	$686,399
Jennifer Coffman	E. Ky.	45	Kentucky	Newberry, Hargrove & Rambicure (Lexington)	$614,333
Wilkie Ferguson	S. Fla.	55	Howard	State Appeals Court Judge	$352,000
David Hagen	Nev.	62	San Francisco	Guild, Busey & Guild (Reno)	$940,800
Raymond Jackson	E. Va.	44	Virginia	Assistant U.S. Attorney	$283,000
Gary Lancaster	W. Pa.	44	Pittsburgh	U.S. Magistrate Judge	$129,624
Reginald Lindsay	Mass.	48	Harvard	Hill & Barlow (Boston)	$726,684
Peter Messitte	Md.	52	Chicago	State Circuit Court Judge	$1,429,900
Lawrence Piersol	S.D.	53	South Dakota	Davenport, Evans, Hurwitz & Smith (Sioux Falls)	$3,100,988
Patti Saris	Mass.	42	Harvard	State Superior Court Judge	$4,685,500
Allen Schwartz	S. N.Y.	59	Pennsylvania	Proskauer Rose Goetz & Mendelsohn (New York City)	$2,483,300
Joanna Seybert	E. N.Y.	47	St. John's	County Court Judge	$537,855
Thomas Shanahan	Neb.	59	Geargetown	State Supreme Court Judge	$424,150
Charles Shaw	E. Mo.	48	Catholic	State Circuit Court Judge	$233,000
Richard Stearns	Mass.	49	Harvard	State Superior Court Judge	$1,002,893
David Trager	E. N.Y.	56	Harvard	Dean, Brooklyn Law School	$1,705,425
Martha Vazquez	N. M.	40	Notre Dame	Jones, Snead, Wertheim, Rodriguez & Wentworth (Santa Fe)	$663,240
Claudia Wilken	N. Calif.	44	UC Berkeley	U.S. Magistrate Judge	$185,000
William Wilson Jr.	E. Ark.	54	Vanderbilt	Wilson, Engstrom, Corum & Dudley (Little Rock)	$569,301

Source: Senate Judiciary Committee questionnaires.

PHOTOCOPY
PRESERVATION

Los Angeles Times

DATE: 4/10/94
PAGE: A2

U.S. Cautions Mexico Against Election Fraud

■ **Politics:** Christopher praises nation's reforms but warns of consequences if the August presidential vote is tainted.

By JUANITA DARLING and DOYLE McMANUS
TIMES STAFF WRITERS

MEXICO CITY—In the midst of this nation's tumultuous presidential campaign, top Clinton Administration officials gently warned the Mexican government Monday that any hints of taint in the election this fall could be disastrous.

Concluding a two-day mission here, Secretary of State Warren Christopher, Atty. Gen. Janet Reno and other top Administration officials also delivered the message that the United States supports democratic reform in Mexico.

"We applaud the far-reaching electoral reforms that Mexico has adopted over the last several years," Christopher said. "We trust that these reforms, combined with your new election technology, will produce a free and fair election that will give all Mexicans confidence in its outcome."

The U.S. Cabinet members' visit was long planned as one of a series of regular meetings between the two governments.

It came, however, at a delicate time—as Mexicans are picking their next president and shortly after governing party candidate Luis Donaldo Colosio was assassinated.

Some U.S. officials worry that the Institutional Revolutionary Party (PRI)—which has ruled Mexico since 1929, often through vote fraud—may be tempted to tamper with the election if its successor candidate, Ernesto Zedillo, appears in danger of losing.

Officially, the Administration says it is convinced that President Carlos Salinas de Gortari's administration plans to carry out a fair election. But Christopher repeatedly warned of the consequences if it does not. He did so subtly in a public speech at the Foreign Ministry and more bluntly in private, aides said.

Besides supporting democratic reform, he warned against corruption and praised the economic and political reforms that have made Mexico one of Latin America's economic leaders.

"The modernizing economic reforms of the Salinas administration have made Mexico a pacesetter for the region and for the world," Christopher said. They also have produced an era of unprecedented cooperation between Mexico and the United States, capped by last year's passage of the North American Free Trade Agreement.

While continuing those reforms in the political arena, the United States wants Mexico to intensify efforts to root out government corruption, especially the political power of wealthy drug traffickers.

"To sustain trust in democracy, governments must attack the scourges of corruption and drug trafficking," Christopher said. "Government cannot be held accountable if its power can be bought. Authority will not be respected if the rule of law can be defied with impunity."

A Christopher aide said his warnings on free elections and corruption were deliberately understated and that State Department officials were more direct in private.

"The Mexicans read these statements very carefully and are hypersensitive to any sign that we are interfering in their internal affairs. So we didn't want to come on too strong in public," he said.

In private, U.S. officials also protested the Mexican government's failure to keep Salinas' commitment to extradite Serapio Zuniga Rios, a suspect in the rape of a 4-year-old Riverside County girl. The governments agreed to negotiate a written agreement on extradition procedures. Until it is completed, an agreement forbidding the abduction of alleged criminals and important to Mexico will not be signed.

Christopher did not meet with any of the nine presidential candidates, aides said, to avoid any appearance of U.S. meddling. He acted appalled at the suggestion, made during a news conference, that his presence could be construed as support for the government—and, by extension, the PRI.

Besides their worries about the fairness of this nation's political system, analysts have expressed concern that Mexico's progress toward a more open society has been threatened by a rising tide of violence, reflected in the slayings of both candidate Colosio and Tijuana Police Chief Federico Benitez Lopez, who was assassinated last month.

U.S. officials said they are concerned that both assassinations may have been ordered by powerful drug traffickers allied with anti-reformist officials.

Both U.S. and Mexican officials are becoming increasingly worried about the corrupting influence of narcotics traffic on the government here. The news weekly Proceso stated that Finance Minister Pedro Aspe Armella has acknowledged that drug traffickers have permeated practically all levels of law enforcement in Mexico. Aspe's office could not immediately confirm that statement.

A senior State Department official said the Administration is concerned that Salinas' drive against corruption appears to have stalled and that drug traffickers appear to have increased their influence, especially in some local areas.

"The central government's control over these things has weakened," the official said. "There has been a kind of institutional entropy."

In some areas, he said, the problem appears linked to a resurgence of conservative, anti-reform elements in the PRI. But at the level of the central government, Mexican cooperation with U.S. efforts to stop drug trafficking has not weakened, he said, pointing to recent large seizures of cocaine.

Los Angeles Times

DATE: 5-16-94
PAGE: B1

Gay Men Now No. 1 Targets of Hate Crimes

■ Human relations: For the first time, black people are supplanted as the most frequent victims. Such crimes are up overall, county figures show, but rate of increase slows.

By DENISE HAMILTON
TIMES STAFF WRITER

For the first time since the county began keeping track, African Americans have been supplanted by gay men as the leading target of hate crimes, according to the 14th annual report of the Los Angeles County Commission on Human Relations.

Hate crimes were up 6.4% overall in 1993, although the percentage of increase was smaller than in previous years.

Gay men were targeted in 27% of the 783 hate crimes logged by local law enforcement agencies and community groups in 1993; 22.9% of the hate crimes were directed against blacks and 14.6% were directed against Jews. Whites were fourth. Jews were the targets of 95.8% of hate crimes against religious groups.

Eugene Mornell, the commission's outgoing executive director, called the report a barometer of public opinion representing the feelings of larger groups who held similar views but did not act on them.

"People are more angry, more willing to confront, willing to chance going out in public and getting caught," Mornell said.

The report shows that there has been a steady escalation in violence, with assaults now accounting for 43.2% of all hate crimes. Last year, for the first time since the county began keeping records in 1980, more hate crimes were committed in public places than at residences.

Commission officials, who called for stiffer penalties for hate crimes, said the most dramatic increase came in incidents based on sexual orientation, which rose 49.7% from the previous year. Gay rights advocates attributed this to greater willingness by victims to come forward and to a higher public profile about issues such as gays in the military.

"We're not surprised, but we're alarmed," said Liza Culick of the Los Angeles Gay & Lesbian Community Services Center. "There's been an increased visibility. We're out there demonstrating, fighting for our rights. That . . . foments hatred."

Frank Berry, a Los Angeles spokesman for the National Assn. for the Advancement of Colored People, said the shift may reflect higher visibility for gays rather than real progress for African Americans.

"Something needs to be done to stop hate crimes across the board and not just against one segment of the population, so that we can look at consistent and steady decreases instead of a few percentage points," Berry said.

"Whenever the economy is bad, people tend to take out their frustrations on minorities," he continued. "There needs to be more education for people perpetrating these crimes and also greater enforcement of penalties, because if it's a slap on the wrist, they won't think about it twice."

His concern for enhanced enforcement was echoed by representatives of other racial groups.

"All too often we hear of police showing up to a home where there's racist graffiti on the wall and the family is told, 'Oh, it's only kids,' " said Kathy Imahara, a civil rights staff attorney with the Asian Pacific American Legal Center. "That family is not going to report such an incident again."

Crimes against Asian Americans dropped significantly, from 80 in 1992 to 44 in 1993. But commission officials believe crimes against both Asian Americans and Latinos are underreported because of language problems, cultural barriers and fears of immigration authorities.

Imahara added that hate crimes seem to mirror the issues being debated by politicians and in the media and that anti-Asian sentiment may merely be ebbing this year as other topics attract greater notice.

"There were a lot of things happening in 1992 that were fomenting 50 year-old hatreds. There were the riots. Bush's trip to Japan, the whole Japan-bashing thing and buying American," Imahara said.

In 1993, a year in which U.S. politicians increasingly blamed immigrants for the country's economic woes, about half the crimes logged against Asians and Latinos included anti-immigrant sentiments, Mornell said.

While hate crimes have risen each year since 1985, the percentage of increase has slowed. The county recorded a 22% rise in hate crimes in 1991, a 10% rise in 1992 and 6.4% last year.

The commission report was compiled from hate-crime data provided by nine law enforcement agencies in Los Angeles County, including the Sheriff's Department, the Los Angeles Police Department and six other city police departments.

PATRICK BUCHANAN

NAACP's battle flag battle

"I'm going to march to Richmond ... and when I go through South Carolina it will be one of the most horrible things in the history of the world. The devil himself couldn't restrain my men in that state."

So pledged Gen. William T. Sherman as he reached Savannah and the sea, after the destruction of Atlanta. Ordered to board ship and sail to Virginia to join Grant outside Richmond, Sherman rebelled in rage and wrote to Gen. Halleck:

Northerners "would rejoice to have this army turned loose in South Carolina to devastate that state. ... This war differs from other wars, in this particular: We are not fighting armies but a hostile people, and must make old and young, rich and poor, feel the hard hand of war."

On Feb. 17, 1865, "Uncle Billy's" army entered Columbia, South Carolina's lovely little capital, to make her "feel the hard hand of war." When Sherman departed 72 hours later, Columbia had been gutted and burned — homes, hospitals, colleges, everything, even an Ursuline convent Sherman had personally pledged to protect.

Today, in Columbia, an astonishing debate is under way: Should South Carolina remove from its capital the battle flag of the boys in gray who fought to stop Sherman's army from burning the city?

Why is South Carolina even discussing this? Because one of the big mules of the National Association for the Advancement of Colored People, William Gibson of Greenville, has issued an ultimatum: Take down the flag — or face an NAACP boycott. The threat appears to have unnerved Mayor Bob Coble and local business leaders who have filed suit to force South Carolina to capitulate.

Stonewall Jackson, thou shouldst be living at this hour!

At the Baltimore African-American summit, the NAACP's Ben Chavis warned South Carolina: We "will determine where we have to apply the heat. And I assure you, heat will be applied."

Now, to be fair, Ben has a track record of "applying the heat." In 1971 he and nine chums were convicted of fire-bombing a white-owned grocery in Wilmington, N.C., for which Ben did 4½ years in the state pen. Who is this arsonist and ex-con to be preaching to anyone?

The battle flag issue is synthetic and phony from the get-go. A June Harris Poll found that more than two-thirds of black Americans have no problem whatever with replicas of the old battle flag being part of the state flags of Georgia and Mississippi. And are Mr. Chavis and Mr. Gibson totally ignorant of what happened in Columbia when the Confederates withdrew and Sherman's army marched in?

Here is an excerpt from Burke Davis' "Sherman's March": "There were no reports of raped white women, but black women of the city suffered terribly, [the novelist William] Simms claimed, many of them ... being left in a condition little short of death. Regiments, in successive *relays*, subjected scores of these women to the tortures of their embraces."

At the chapel of the convent Sherman had pledged to protect, "The schoolgirls were kneeling, reciting the rosary, when the chapel door was broken in. ... Drunken soldiers piled over each other, rushing for the sacred gold vessels of the altar ....

"The girls filed past the cursing men into the night. ... Father O'Connell led them into a nearby church, from which they saw the burning convent roof collapse into a fiery grid of timbers. ... At 3 in the morning its cross plunged earthward in a cascade of flames."

What kind of timidity and cowardice are today gripping South Carolina that so many of her sons will not defend the battle flag of kinsmen who fought and died to prevent this from happening?

"That flag represents the worst of America, and we must not only take down the flag but what the flag represents," rails Mr. Chavis.

Well, to better men, long ago, it meant something else. In High Tide at Gettysburg, Glen Tucker described what that flag meant to the men of North Carolina's 26th regiment, at McPherson's Ridge:

"Though he belonged with the staff, [McGreery] foolishly seized the regimental flag ... and rushed out in front of the line. He was shot instantly through the heart. Lt. George Wilcox of Company H ran forward and pulled the blood-covered flag from under the body; Wilcox had taken only a step when two bullets struck him. ...

"Seeing the regiment waver, Burgwyn seized the flag as it fell from the hands of Wilcox and shouted, 'Dress to the colors.' ... Pvt. Frank Honeycutt of Company B ran from the ranks and requested the honor of advancing it. Burgwyn had turned to hand over the flag when a bullet struck his left side, passed through both lungs, spun him around with its force, and dropped him mortally wounded. He carried the colors down with him. Honeycutt seized them, but almost instantly he was shot through the head. Thus for the 13th time in the attack, the flag of the 26th North Carolina was on the ground."

That's what the battle flag meant to the men who fought at Gettysburg. What has happened to South Carolina that she would permit a pair of noise-makers like Mr. Gibson and Mr. Chavis to frighten them into hauling down these colors of courage?

Patrick Buchanan is a nationally syndicated columnist.

The Washington Times ★ WEDNESDAY, JULY 27, 1994

FCC auction sets stage for cellular phone war

By Paul Wiseman
USA TODAY

The cellular phone business is on a roll, picking up 14,000 customers a day and producing fat profits for big players such as GTE and BellSouth.

But today the Federal Communications Commission starts auctioning radio bands for a new technology: personal communications services. PCS could include everything from two-way pagers to mobile phones that send and receive faxes and other information.

PCS and other new rivals could change wireless communications for good, pushing down cellular rates as much as 40% in some places and driving rival cellular companies into each others' arms to cut their operating costs.

Most U.S. markets now have two cellular providers, a cozy duopoly that allows relatively high prices. Not much longer.

Today's auction isn't much of a threat to cellular; it's mainly for advanced paging services. But later this year, the FCC will hold a "broadband" auction for PCS devices that can match today's cellular phones and do even more.

The other threat comes from a wireless technology called specialized mobile radio. The key SMR player: Nextel, a Rutherford, N.J.-based company backed by MCI.

Also on the horizon: AT&T is buying McCaw Cellular to create a cellular behemoth with nationwide reach.

Soon, most markets will have five or six wireless providers — a prospect that "scares the s---out of" cellular companies, says Herschel Shosteck, a wireless consultant.

Already, cellular companies are readying for battle by:

▶ Doing deals. Last month, Bell Atlantic and Nynex agreed to combine their cellular phone businesses. By joining forces, they can cut expenses such as advertising and offer more competitive rates.

Bell Atlantic and Nynex are talking to other potential partners, including Sprint. Other regional Bell companies are expected to ally their cellular operations in outright mergers or joint ventures.

▶ Beginning to reduce prices. Cellular phone rates, including the much-hated roaming fees cellular users have to pay when they leave their home territory, are falling.

Southwestern Bell has negotiated roaming fee reductions with other cellular carriers. The firm says roaming fees in New York are down 33% from a year ago; in Portland, Ore., down 50%.

"There's no way this won't be a replay of competition (in the long-distance market) among AT&T, MCI and Sprint," Shosteck says. "Cellular rates will drop 20% to 30%."

▶ The auction, 5B

Tight times for higher education

By Tamara Henry
USA TODAY

U.S. colleges and universities, buffeted by public funding cuts and other money woes, will be "leaner and meaner" by 2000, says an American Council on Education report out today.

Campus Trends, 1994, based on surveys of 406 senior academic administrators at two- and four-year schools, finds:

▶ 38% say budget problems cause increased class sizes in introductory courses.

▶ 22% report increased teaching loads.

▶ Fewer schools say their financial aid is adequate. Only 20% of the institutions give high rankings to their financial aid, down from 37% a year ago.

▶ 71% of public schools say reduced state support has forced greater reliance on tuition for revenue.

"Affordability is clearly threatened by these numbers," says ACE's Elaine El-Khawas, report author. "Public institutions have always tried to be affordable at the tuition level, and those institutions now have a greater reliance on tuition."

To become more efficient, 40% of schools have eliminated academic programs during the past few years. El-Khawas says that "in many areas, they are programs that are quite defensible," including library science and nursing.

"Reorganization and redirection may be the defining themes of the 1990s for American higher education. Even with a somewhat improved budget picture at some institutions, the financial difficulties of recent years have established a powerful momentum for streamlining operations, controlling costs and reducing expenses," she says.

Urban League chief: Racism not only factor in economic disparities

By Desda Moss
USA TODAY

Hugh Price, the new president of the National Urban League, Sunday said a changing world economy, not just racism, accounts for the economic gap between the races.

"Yes, racism is still abroad in the land," Price said in a keynote address at the organization's convention in Indianapolis. "Even so, we must not let ourselves and, especially, our children, fall into the paranoid trap of thinking that racism accounts for all that plagues us."

The goal is "to help dependent people become independently productive," he said.

AP

PRICE: 'We must tithe with our time.'

Price, on the job since July 5, also staked out a place on the political spectrum that put him at odds with some African-American leaders.

Referring obliquely to the tensions between blacks and Jews over Nation of Islam Leader Louis Farrakhan and the anti-Semitic remarks attributed to him and some aides, Price said: "Just as we denounce misleading media stereotypes of African-Americans, it is morally repugnant as well to impugn an entire people, especially longstanding allies, like Jews, because of the unconscionable behavior of some of them."

The Urban League is willing to work with others even where there are disagreements.

"Our allies should understand that serious-minded African-Americans must be free to discuss the acute pain afflicting our community. Even if that means conferring with those with whom we vehemently disagree on other issues," he said.

Still, Price said his involvement in the African-American leadership summit planned for August by the NAACP is not a priority. "The priority is to make sure that *our* agenda is in place."

Unlike the NAACP, which boasts more than 625,000 members, the Urban League is not a membership organization. It provides services, ranging from job training to tutoring, to more than 1 million people through its 113 affiliates in 34 states and Washington, D.C.

Price, 52, the Urban League's seventh president, promised an aggressive program to make the 74-year-old group "a force to be reckoned with, not merely another minority face at the table."

He said business and government should be pressured to set aside jobs and training positions for poor people regardless of race.

"What if employers reserved training slots and real jobs for residents of neighborhoods or Census tracts with high unemployment rates?" he asked. "The way I see it, this wouldn't be a politically contentious race-based approach. Instead, it's a more palatable alternative which recognizes that poor people of all races need decent jobs."

Price also wants to make greater claims on the black middle class.

"We African-Americans who have made it must tithe with our time and, more importantly, our money to see to it that those of our children whom the civil rights movement hasn't yet touched also have a real chance to succeed."

One plan calls for families to contribute $500-$1,000 a year to a Youth Development Fund that would support a variety of programs around the country. The programs would be run by community groups, other nonprofit organizations. The Urban League would help raise the money and monitor how it's spent.

Price, a graduate of Yale Law School, worked as an editorial writer for *The New York Times*, senior vice president for New York City's public TV station and a vice president of the Rockefeller Foundation.

He says priority problems of "inadequate schooling, idle and alienated youngsters and chronic unemployment — cut across racial lines."

"If we're ever to deal with them on a scale remotely equal to their size, we simply must coalesce with people of other complexions who feel the same pain, even if it isn't yet as acute."

Contributing: Shrona Sheppard

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William Raspberry

The Urban League Action Plan

THE WASHINGTON POST WEDNESDAY, JULY 27, 1994

People who believe a problem can be solved tend to get busy solving it. Doubters spend their time making sure everybody knows it's someone else's fault.

Hugh B. Price is a believer. The new president of the National Urban League used his keynote address (last Sunday, at the league's annual convention in Indianapolis) to take on some of the toughest problems facing black America—not to distribute blame but to talk, in plain language, about possible solutions.

"We must not let ourselves—and especially our children—fall into the paranoid trap of thinking that racism accounts for all that plagues us," he warned, noting that the culprits include economic trends that transcend race, even though inner-city blacks may be disproportionately victimized by them.

It was an extraordinary speech, with food for virtually every mainstream philosophy: a little demand and a little self-blame, a little long-term development and a little here-and-now realism, a little integration and a little racial self-sufficiency, a little capitalism and a little economic planning.

But for me, the heart of his remarks was his call upon black Americans to get busy on the problems nearest at hand: the rescue of our children, the restoration of our families and an end to our economic and social marginalization.

"Politicians talk incessantly these days about taking back the streets from criminals," he said. "I say we take back our children from the streets, and the streets will take care of themselves."

How might that be done? First with an all-out effort to educate our children for the difficult years ahead, not merely by demanding more from schools but also by insisting on more from parents. Price called for the league's affiliates to mount a "house-by-house, living room-by-living room" drive to "help parents understand, in laymen's terms, exactly what their children must know and be able to do in order to meet 21st century standards of competency."

> *"I say we take back our children from the streets, and the streets will take care of themselves."*
>
> —Urban League President Hugh B. Price

And after school? "I propose that each affiliate establish a Youth Development Fund and formulate, in conjunction with others in the community, a master plan for delivering youth services after school and over the summers in churches, schools, settlement houses, community centers, safe homes, museums, even National Guard armories."

Price, 52, is hardly the first to call for improved schools, better after-school facilities or economic reform. But he is one of the few civil rights leaders who has put the onus of solution (not to say the blame) on blacks themselves.

The money for some of those programs, for instance, would come "from our young, well-heeled professionals who don't yet have family obligations, from older folk like me whose children are out of college . . . from the Elks, the frats and so on."

His recommendation: $500 to $1,000 a year—and from people of all races who can afford to give, or who cannot give but are willing to stage fund-raisers instead. People at all income levels might "tithe their time" in direct service, he suggested.

If you haven't been paying close attention, much of what Hugh Price said in that speech will sound fairly routine. It isn't.

The current civil rights emphasis on racism has the ring of militancy, but it offers no solutions to the deadly problems infecting black communities. In many cases it is just another way of saying, "It's not my fault."

Worse, the near-exclusive focus on racism has another consequence that no one seems to talk about. It produces what appears to be indifference on the part of whites. One of the hallmarks of the 1960s civil rights movement was the massive involvement of whites working alongside blacks. Relatively few whites are intimately involved today, though the problems are at least as severe.

The difference: In the 1960s, the blacks who led the movement made sure that whites had a role in it, whether as fund-raisers, as activists or as lobbyists. Today's leaders often offer whites a single role: that of villain. Not surprisingly, few are applying.

Hugh Price, who understands the futility of scapegoating, is giving white people something to do. That's smart.

He's also giving me—a decently paid, seriously concerned but only marginally involved member of the black middle class—something to do. That's *genius*.

Speed Limit for the Economy

WHEN ALAN GREENSPAN appeared before the Senate Banking Committee last week, Sen. Paul Sarbanes sharply chided him for "counterproductive" interest rate increases. It was the latest round in the continuing debate over the speed limit at which the American economy can be driven. Mr. Greenspan, who is chairman of the Federal Reserve Board, thinks that the economy is currently growing faster than the speed limit and needs to be slowed down. Sen. Sarbanes thinks the economy is still well below full capacity and can run at its present speed for quite a long time—generating more jobs—before any danger of inflation appears.

Since Sen. Sarbanes is running for reelection in Maryland this year, and since in a Democratic Senate he would be the next chairman of the Banking Committee if he wins, this dispute deserves the attention of Maryland voters in particular. If the senator is right, it would be possible to get employment higher than is likely at present interest rates. If Mr. Greenspan is right, faster growth would mean inflation and recession. There's no simple arithmetical rule to show who's right. It's a matter of judgment and how much risk the country is willing to run in order to get employment somewhat higher.

"One of the best signs that we still have ample slack in the labor market," Sen. Sarbanes said, "is the dearth of people coming into the labor force." But maybe not. After previous recessions the labor force has generally grown strongly, and the senator is correct in saying that hasn't happened this time. But last winter the labor force as a proportion of the total adult population hit a record high, and unless you think this proportion is going to keep rising indefinitely, you are entitled to wonder how much slack really remains.

Economic growth is the rise in the number of people working multiplied by the rise in productivity. Mr. Greenspan believes that productivity rises fastest in times of low inflation. Sen. Sarbanes is skeptical, but Mr. Greenspan argues that many businesses take productivity seriously only when they can't keep raising prices. The issue here is whether low inflation is important for high growth.

The unemployment rate for the past two months has been 6 percent. Reagan-Bush policy pushed it as low as 5 percent at one point in early 1989, with the result that the inflation rate shot up over 6 percent in 1990 and the economy slid into the 1990-91 recession. Pushing the limits of employment can be dangerous, and the margin of error is narrower than Sen. Sarbanes thinks.

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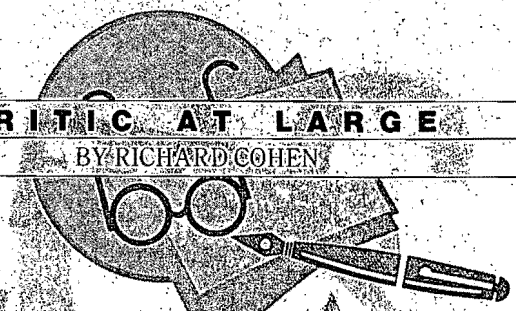
CRITIC AT LARGE

BY RICHARD COHEN



Book Value

THE OTHER NIGHT, AFFLICTED BY insomnia, I allowed myself a modest amount of tossing and turning, but I was, in truth, in a contradictory frame of mind. I wanted both to fall asleep and stay awake. If I were to sleep, I would awake rested; but if I stayed awake, I could return to the book I have been reading and read some more. The book is *Sacred Hunger*, a novel about the slave trade (and much more), by Barry Unsworth, an Englishman who was living in Finland when he wrote it. Far removed from Africa, where the slaves were bought, or Jamaica, where they were bound, or even Florida, where, somehow, some of them wound up, he managed through his research to recreate the period of the Triangle Trade when goods were brought to Africa, slaves taken to the West Indies or America and then other goods taken back to England. Greed was at the heart of it all, questions of morality finding no column of their own in the ledger books of anyone involved. As you can see, *Sacred Hunger* is also about our times.

No book in quite some time has so saddened me. I am referring not just to its story, which is tragic enough, but also in part to the plain and awful fact that until a friend recommended it, I had never heard of the book. I have checked and found reviews galore, some of which I must have read at the time (late 1992), but which found no space in my crammed brain and spilled into the runoff (along with Tuesday's appointment for lunch). In fact, the reviews were ecstatic, waves of raves. "It is superb," wrote Gary Jennings, himself a historical novelist, in The Washington Post. Thomas Flanagan, the author of *The Year of the French*, called it "a book of grace and meditative elegance, and of great moral seriousness."

And yet, for all the critical acclaim—I could cite other reviews—this book never really went anywhere, selling only modestly. There is reason for sadness in that. Great works should be recognized, of course, and this one was in a special way. (It won England's prestigious Booker Prize.) But I suppose there are works of poetry I will never hear of and never read that are works of genius—and the same may be true for contemporary serious music, often a clanging of pots, pans and the sounds of cats in lust that is the unhappy product of too much foundation money chasing too little talent.

But my true sadness in reading *Sacred Hunger* was the recognition that I could never do something similar. Mind you, I do not compare myself to Unsworth. And neither do I compare myself to Brahms, whose First Symphony took him forever to compose because he was haunted by Beethoven's standard. But we would all like to think that we could—if we had the time or the money, etc.—do this or that. I'd like to think I could write a novel—not a conventional Washington novel, but one brimming with ideas, with insights, with characters both plain and sophisticated whose chance remarks make you pause and salute their wisdom. That sort of novel explains why the art of fiction writing has never been seen as the mere telling of tales, but as a branch of philosophy—and why writers can be considered intellectuals while musicians or painters, by and large, are not.

Unsworth has set what I fear is an unattainable standard. Six months of research, much of it just reading, and three years of writing resulted in a book so rich in detail, so knowledgeable about the slave trade and the 18th-century world, that the reader can only be startled that such information is still available. Unsworth assembles the slave ship before your eyes and then staffs it with the refuse of British society—mostly indebted men seeking to make the only way they can. He establishes a food chain of the exploited with the African slave at the very bottom. But even the slave is for a time worth more than any crew member. Slaves are valuable, a capital investment. Crew members are disposable.

This is not a perfect book. It starts too slowly and it has a definite Eurocentric slant. The details are sometimes as dense as the African jungle. But the accretion of detail has a purpose. This book is like the slaver itself. Once you are aboard, you know you are in the hands of a master. If it is true that the mast was made of Baltic fir, then it is also true that slaves died of the "bloody flux" and that a fiddler played for them daily, a forced dance to keep the valuable cargo valuable by keeping it fit. If it is true that most whites considered black Africans little more than beasts, it is also true that some did not. It is also true that without the benefit of presumed racial superiority, African middlemen bought human beings in the interior and sold them to Europeans on the coast. And it is true that back in England, certain men became fabulously rich—and Liverpool flourished—on the sale of human beings. These men thought only of profit and were esteemed for the money they made. Only in the particulars have things changed all that much.

I reached Unsworth in Perugia, Italy, where he now lives. The modest success of his recent novels has enabled him to devote himself only to writing. "I just about manage to subsist," he said. He considers himself something of a success because at age 63 he can live off his writings. Little in life is more wonderful than a sunny day in Italy and being able to write what you please. Nevertheless, I said I hoped he became filthy rich, and he chuckled at that. I think he'd settle for wider recognition. God knows, he deserves it. ■

PHOTOCOPY PRESERVATION

THE WALL STREET JOURNAL WEDNESDAY, JULY 6, 1994

For Real Black Leadership, Look to Grass Roots

By Robert L. Woodson

One third of America's black population reels under the effects of poverty, rampant crime, drug abuse and skyrocketing rates of teen pregnancy. Yet those who claim the mantle of black leadership continue to retreat to the conference table, as 100 purported black spokesmen did at the NAACP's most recent summit in Baltimore.

To a constituent who asked about the strategies that emerged from the conference, one participant replied: "Now, these problems didn't grow up overnight and they can't be solved overnight. We will need time to talk about them more and work them out." Such sentiments stand in stark contrast to Martin Luther King's 1963 exhortation for action, "Why We Can't Wait." Black America is not facing a crisis of conferences but a crisis in confidence in those who have assumed leadership positions.

Although the NAACP conferees have pledged to reconvene next month, prospects for solutions from the second gathering do not look bright. Ben Chavis, the head of the NAACP, said that one "action point" would be to assess what the local, state and federal governments are doing for African-Americans, in order to determine "where we need to apply the heat." This is a sign that the deliberations of the summit were guided by the same mind-set that has led many black "spokespersons" into the realm of irrelevancy—a belief that both the cause and solutions of the problems faced by black Americans lie outside the black community.

Fortunately, there is another message being issued—not by the participants of "leadership" conferences and summits, but by grass-roots activists who don't have time to wallow in their plight as victims. It is these community leaders who are reviving and building on a rich legacy of self-sufficiency, personal responsibility and self-determination that had once been the bedrock of the black community.

With tragic irony, in their quest to give their children a better education, to gain access to the job market, and to improve the quality of life in their neighborhoods, these activists have faced enormous obstacles—in the form of their own purported representatives.

For example, although a recent survey of the Joint Center of Political and Economic Studies indicated that 88% of the black community supports school vouchers as a way of providing improved education to their children, the Congressional Black Caucus has been one of the most strident opponents of voucher proposals.

In another arena, the Davis Bacon Act demands that any construction project that receives federal funds must pay "prevailing" (union) wages to its workers. This effectively forces lesser-skilled laborers out of competition with their union counterparts. Though it has been shown that opening access to these union-controlled jobs could provide more than 750,000 new employment opportunities for low-income laborers, the Davis Bacon barrier has been most ardently defended by black elected officials.

In yet one more arena, public housing, grass-roots activists striving for self-determination have run against impediments presented by their "representatives." Throughout the nation, residents of public housing have organized to win management responsibilities for their housing developments. In numerous cases where residents have been given the opportunity to take control, the conditions of their communities have improved impressively—as measured not only by physical appearance but also by a decrease in crime, a drop in rates of teen pregnancy and a reduction in drug-related activity.

Yet, once again, members of the black inner circle have been the most vocal opponents of resident management and homeownership initiatives. One black member of Congress decried the movement to empower public housing residents as "a cruel hoax." In June 1991, when then-Rep. Mike Espy spoke from the floor in favor of a federal program that facilitated resident management and homeownership, he was literally booed by a number of his colleagues in the Congressional Black Caucus.

It is no accident that the leaders' circle has turned a deaf ear to the voices of its constituents in these, and many other, cases. A confluence of agendas has resulted in a virtual "iron triangle" of elected officials, unions and the civil-rights establishment—an alliance that has effectively blocked all efforts toward substantial reform.

While blocking reform, many black leaders have been content to pursue symbolic causes that entail no responsibility for action on their part. Among the topics considered by the elite that was gathered at the NAACP summit, for example, was a critique of the state of South Carolina regarding the Confederate flag that flies above its statehouse. To take another example: In universities and office buildings throughout the nation, hundreds of the most highly trained and well-educated black professionals and academicians are making preparations to attend the Fifth Annual Conference on Reparations. Yet, for those who are suffering the conditions of life in the killing fields of today's inner cities, the technicalities of determining who should receive restitution for the enslavement of blacks a century ago are hardly a priority.

If the black community is to change course from imminent destruction, a new leadership must be recognized—one that has proved that it is willing to address the problems of its constituents and accept the responsibility to pursue real solutions. We can no longer tolerate a situation in which an elite group prospers while the situation of its constituents worsens.

Mr. Woodson is president and founder of the National Center for Neighborhood Enterprise, based in Washington.

Ready Kilowatt

Competition is contagious. Faster than the control freaks in the political process can bottle it up, it spreads to another area of daily life, transmitted all the while by technology. Now it looks to be coming to electricity.

Realistic state regulators, led by California, are proposing to get out of the way and let industrial and residential consumers alike purchase their power from the many sources now willing to generate and supply it. (Despite the periodic brownouts in certain locales, there's an electricity glut nationwide.)

Liberation could come first for the biggest users and within a decade for home sweet homes. One study by some interested parties suggests that in a high-rate state such as California, a free market for this energy could save the economy what amounts to $200 a year for every person in the state. For New Yorkers, the gain could be even greater; indeed, the whole Northeast stands to feel much cost relief.

Lots of objections are being raised, and no transition of this scope ever comes off without hitches. But the inevitability of such change, now that electricity isn't as confined by geographic reach or economies of scale, is what stares regulators in the face. For much the same reason, natural gas monopolies have broken down at the big-user level, and despite the Gore FCC, telecommunications inevitably will become a complete free-for-all.

High-cost states particularly need to consider the competitive option because the longer this reform is stalled, the more incentive that major users of electricity will have to move operations elsewhere. Even at the household level, high-power computing and other advanced appetites for power are driving up utility bills in the most conservation-minded of homes, meaning everybody is eager for a better deal.

Already, however, opposition to this looming liberation has formed. It comes from those interest groups that find, in the utilities, an ever more lucrative feeding ground. Economists call it rent seeking: the capture of somebody else's dime through cost shifting and padding. When politicians and regulators must approve a "fair," cost-plus formula for utility rates, the lobbies swarm to get their cut out of everyone's bills.

Thus the alternative-energy crowd is wary of a true marketplace, because their subsidies are at stake. Who knows where the electric-car zealots would get the recharging stations that they expect other people to build for them (via the utilities)? And what about all the special rate breaks for some users? Surely, some transfer payments will remain, just as Al Gore's team wants to preserve them in telecom, but this is a chance to wipe the slate nearly clean. (Better to legislate vouchers to those who really can't afford enough kilowatts to get by.)

Consumer organizations are going to be tested on this: Do they really represent all consumers, as would be reflected in a preference for low overall rates, or are they just fronts for particular constituencies? Likewise, will the securities industry, in its solicitousness toward the old mainstays of income investing—utilities are already cutting their dividends—raise every possible red flag?

In short, this competitive development can be delayed more than a decade if the tyranny of the status quo prevails. But even liberals should find appeal in an end to energy monopolies. After all, that was one of Franklin D. Roosevelt's tenets. He chose to fight them with big public-power suppliers that turned out to have their own drawbacks. We like the new current now coming from the countryside.

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Simpson alibi challenged

Testimony suggests he wasn't waiting at home

By Dennis Cauchon and Debbie Howlett
USA TODAY

A1

LOS ANGELES — Prosecutors Tuesday opened a 70-minute gap in O.J. Simpson's alibi for the night his ex-wife and her friend were killed.

Witnesses at Simpson's preliminary hearing — which determines whether he'll face trial on murder charges — told the court of his whereabouts for the evening, except between 9:45 and 10:55.

Earlier testimony suggested Nicole Simpson and Ronald Goldman were killed between 10 p.m. and 11 p.m. on June 12.

Simpson pleaded innocent.

The hearing, which is being televised, resumes today with more testimony on a defense motion to suppress evidence taken from Simpson's home.

The defense is arguing police did not have a search warrant when they climbed the 5-foot wall onto the grounds.

Testimony Tuesday:

▶ Limo driver Allan Park said he buzzed Simpson's gate starting at 10:40 p.m. but nobody answered for 20 minutes. Just before that, he saw a 6-foot, 200-pound black person in dark clothes walking toward the front door.

Simpson then answered the buzz, saying he'd overslept and had been in the shower.

▶ Brian "Kato" Kaelin, who lived in Simpson's guest house, heard three loud thumps on his wall about 10:40 p.m. Police later discovered a bloody glove on the ground nearby.

▶ A mysterious bag — handled only by Simpson, who took it to the airport — was seen in the driveway by Park. Whereabouts: unknown.

▶ Bloody footprints at Nicole Simpson's home indicate the murderer fled through a back gate and into an alley.

Much of Tuesday afternoon was taken up pinpointing why police entered Simpson's home without a search warrant.

Detective Mark Fuhrman said the "totality" of the circumstances — two people stabbed to death, no answer at Simpson's gate and blood on his Ford Bronco — was enough reason to enter the grounds.

"We had plenty of probable cause," Fuhrman said. "I was personally more concerned with someone bleeding to death inside."

The mysterious sealed envelope turned over to the court by the defense was not mentioned Tuesday.

Case against him a matter of time; sequence so far, 2A

Rwandan rebels call for civil war cease-fire

By Charmagne Helton
USA TODAY

A1

Rwandan rebels have stopped short of a confrontation with French troops by calling for a cease-fire in their 3-month-old civil war and announcing plans to create a new government.

French marines were on a collision course with the rebel Rwanda Patriotic Front, dominated by minority Tutsi, after setting up a safe haven for 400,000 fleeing Hutu, including some government forces.

"I have good reason to believe that the clash which everybody is predicting will not take place, simply because we are in contact" the rebel forces, French Foreign Minister Alain Juppe said Tuesday.

The rebels, who seized the capital of Kigali Monday, control about two-thirds of the country. The vicious warfare has claimed 500,000 lives, mostly Tutsi slain by government Hutu forces.

"The problem (is) France is involved in helping the government responsible for all the problems," says rebel commander Paul Kagame.

He says France's handling of the zone "raises questions. It comes across as a threat."

French President Francois Mitterrand, pleading for international support, says his country isn't looking to fight.

"France is not trying to stop the military advance of one of the sides," Mitterrand says.

"We are trying to protect people," says Juppe. "That's a humanitarian aim."

U.N. Secretary-General Boutros Boutros-Ghali endorsed France's decision to set up humanitarian zones in Rwanda, despite the concerns of some Security Council members.

U.S. limits asylum for Haitians

By Steve Komarow
USA TODAY

A1

President Clinton is cutting off asylum on the high seas for desperate Haitians, to keep thousands more from fleeing that troubled country.

The policy shift was announced Tuesday as more U.S. ships were sent to the region.

Under the new policy, up to 10,000 persecuted Haitians who can't be sent back will be taken to Panama, not the USA.

"Those who take to the boats will be offered safe haven" until they can return home, says William Gray, White House special adviser on Haiti.

Until Tuesday, Haitians picked up at sea and classified as political refugees could apply to enter the USA.

But after 10,000 took to their boats in the past week, including a record 3,247 picked up Monday, the White House said only those applying within Haiti will get that chance.

Gray insists administration goals are constant: "There's only one message ... the coup leaders must step down."

The four additional Navy ships and 2,000 Marines are being dispatched to the region today. They'll be ready to evacuate 4,500 U.S. citizens.

"It looks like somebody is setting up an invasion," says opponent Senate Minority Leader Bob Dole, R-Kan.

Adds Raymond Joseph, editor of Brooklyn-based weekly, *Haiti Observateur:* "Every time the U.S. says it's going to send troops to protect Americans, who are not threatened at all, it's a signal they are going to invade. They did it in Grenada, they did it in Panama."

Gray says "there is no military option imminent," defining imminent as within "days."

It'll take about four days for the ships to arrive. They'll join 11 Navy ships already there.

USA TODAY · WEDNESDAY, JULY 6, 1994

One-third of NYC's homicide victims used cocaine

By Steve Marshall
USA TODAY

A1

Nearly one-third of New York City's homicide victims had cocaine in their systems when they died, said a study released Tuesday.

"We think there's something going on in terms of availability of guns and use of cocaine," says Cornell University's Kenneth Tardiff.

Of the 4,298 New York City residents who were homicide victims in 1990 and 1991, 31% tested positive for cocaine.

Black victims 25 to 44 years old were more likely than not to have evidence of cocaine in their systems.

"Homicide victims may have provoked violence through irritability, paranoid thinking, or verbal or physical aggression," says the study, which appears in the *Journal of the American Medical Association.*

Most startling, says Tardiff, is that among 25- to 34-year-old victims, women seemed as likely as men to use drugs.

"It seems that women are placing themselves in dangerous situations because of cocaine," says Tardiff.

Among those situations: crack houses and prostitution.

"These statistics show that we have to address the availability of firearms and the availability of cocaine," Tardiff says.

Don't draw districts along racial lines

The Supreme Court was right; remedies to elect minorities are neither constitutional nor necessary.

BETHESDA, Md. — The Supreme Court is trying to dig itself out of a hole of its own making on voting rights. The problem is the same on other controversial social policies like abortion and affirmative action.

With each of the issues, the court has been playing social engineer for more than three decades, interpreting laws and the Constitution to promote its own vision of the good society. The role is clearly beyond what the Constitution envisioned — and besides, the court is not very adept at it.

COUNTERPOINTS
By Linda Chavez

Last week, the Supreme Court handed down two voting-rights decisions which place modest limits on what courts can require state and local jurisdictions to do in order to create racially defined election districts.

In a case involving reapportionment of the Florida House of Representatives, the court said the legislature need not create the maximum feasible number of majority-Hispanic voting districts, especially after it had already created sufficient majority-Hispanic districts to achieve roughly proportional representation for Hispanics.

In the other case, the court struck down a lower court decision that ordered a Georgia county to abandon its 82-year-old practice of electing a single commissioner to run all county executive and legislative functions.

The court rejected black voters' claims that, since they constituted 20% of the electorate in the county, the state Legislature should create a five-member county commission with voting lines drawn so that blacks could elect one member.

Perhaps we should be thankful the court has handed us these incremental victories against racial gerrymandering. But if it weren't for earlier court decisions, we wouldn't even be considering whether voting districts should be constituted on racial lines.

For most people unfamiliar with the arcane world of voting rights law, the notion is bizarre that civil rights statutes and the Constitution permit — much less require — that election districts be drawn along racial lines.

Yet for the past 25 years, federal courts have been ordering state legislatures to do just that in order to increase the numbers of minority elected officials.

The Voting Rights Act itself says nothing about drawing district lines by race. The law was originally passed in 1965 to ensure that blacks had access to the polls in the Deep South, where they had been prevented by various devious methods from voting for nearly 100 years.

The language of the law was clearly aimed at guaranteeing the right to vote to blacks, and later Hispanics and other minority groups.

But by 1969, the court was already interpreting the right to vote to mean the right to vote in districts where they formed a majority of the voters. In *Allen vs. State Board of Elections*, the court essentially bought the argument of civil rights groups that non-discrimination doesn't merely require equal opportunity — in this case, access to the voting booth.

According to this line of reasoning, non-discrimination also requires equal results: Minority candidates must be elected in numbers equal to their proportion of the population, despite a disclaimer in the law which disavows proportional representation.

The effect of this decision was to involve federal courts in carving up election districts to satisfy demands for racial representation.

In his concurring opinion in the recent Georgia case, Justice Clarence Thomas complained that the court has "converted the [Voting Rights] Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups."

He's right.

The only way for the court to dig itself out of this hole is to adopt Thomas' suggestion that it stick to interpreting the plain language of the voting rights statute, which nowhere requires redistricting decisions to be made on the basis of race or proportional representation.

It's a sound piece of advice. Of course, it would mean that the court abandon its practice of trying to shape a better society and adhere to its proper role of enforcing federal laws and the Constitution — as written.

COUNTERPOINTS' four columnists provide views from diverse perspectives on today's issues. **Thursday:** Susan Estrich on parental responsibility. **Mondays:** Tony Snow. **Tuesdays:** Michael Gartner. **Wednesdays:** Linda Chavez.

Congress plays politics with tobacco

A big cigarette tax hike was the right decision, but a House panel on health reform made a big retreat instead.

It is no secret, the low regard in which the public holds Congress. Six out of 10 Americans disapprove of the way it conducts its business, and the number keeps growing.

This is not because Americans don't understand or care enough to form a valid opinion. In fact, the more people follow the action on Capitol Hill, the less likely they are to approve of what goes on there.

By Joe Urschel

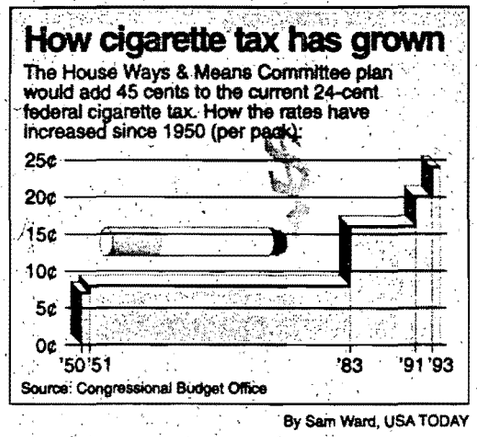
Who can blame them?

Session after session, members of Congress provide the public with textbook examples of how they will not do what their constituents demand, they will not do what the president demands and, ultimately, they will not do what logic and morality demand.

The latest illustration is the treatment of the proposed cigarette tax increase by the powerful House Ways and Means Committee.

In order to pay for his goal of universal coverage and to simultaneously reduce medical expenses, President Clinton had proposed a tax of $1 per pack of cigarettes.

If anything made sense in the president's health-care reform package, it was this.



By Sam Ward, USA TODAY

The massive tax would result in one of two scenarios — both good.

It could raise enormous amounts of money for health care — according to the government's estimates, as much as $14 billion a year.

On the other hand, it might cause more smokers to quit rather than pay. That would mean less revenue from the tax. But that trade-off would be beneficial as well because the nation's health bills would be lower. Currently, we spend about $65 billion a year caring for the diseases brought on by smoking — the nation's No. 1 killer.

The proposed tax was also just. It directly hits those who put their health most at risk.

Most important, though, public support for the tax is overwhelming.

In poll after poll, support for a cigarette tax of at least an additional $1 a pack is over 70%. For $2 a pack, it is about 65%.

Even at over over $2 a pack, it enjoys support from a majority of Americans.

Yet, when Clinton's proposal reached the Ways and Means Committee, its chairman, Sam Gibbons, D-Fla., trimmed it to 45 cents when representatives of tobacco-growing states objected. Might this be one reason eight of 10 Americans think Congress cares more about special interests than the people's interests?

Representatives whose parents had died of lung cancer, who called tobacco companies "worse than criminals," all lined up and voted to reduce the tax. Because, after all, this is politics.

And this is Congress.

Here, one committee investigates tobacco companies and equates them with drug dealers and death merchants.

Then, before you can blink, another committee votes to not place too great a burden on this "industry" which hooks an estimated 3,000 children a day on the only legal product which — when used as directed — results in disability and death.

But according to the perverse perspective that one develops in Washington, the Ways and Means committee action is described not only as a victory for the tobacco companies, but for the president as well.

The president himself called it a "giant stride."

Hillary Clinton was so thrilled with the committee's action she sent Gibbons a case of beer.

So once again we find ourselves disapproving of the way government conducts its business.

She should have sent him a pack of Marlboros.

Precious little progress

You may want to draw a single deep breath of relief: The health-reform debate has at last moved to its next stage. The threshold — from committee to the full Congress — was crossed last weekend when the last of four committees considering reform completed its work.

Health Care Reform

Majority leaders in the House and Senate will now take the five different bills (three in the House, two in the Senate) and craft single plans for their chambers to debate.

For many, this process will produce more good news. The most common elements — thus the ones most likely to survive — are also the most sensitive to the middle class. Among them:

▶ **Insurance reforms.** These would make your health insurance portable and would eliminate the exclusion many insurers place on pre-existing conditions. Both reforms make it easier to change jobs. Another would make insurers charge a community-based premium, which ought to shield households from sudden, punishing premium hikes.

▶ **Voluntary alliances.** These would allow small businesses to join together to purchase insurance, thus providing coverage to more workers at lower rates.

▶ **Limited taxes.** The plans levy higher tobacco taxes. Some also propose an additional tax on some generous health plans. But only the single-payer proposal, which has no chance of enactment, imposes a broad-based tax.

All this will benefit well-compensated workers. But the prospects for others are less positive. Every plan promises to subsidize insurance for the near-poor, for instance. But not one assures that money for those subsidies will always be available.

Worse, Congress is likely to reject a requirement that employers provide insurance and individuals buy it. And without that mandate, healthy people are liable to drop their insurance. Result: price increases that leave insurance available to all but affordable only to some.

That won't endanger most of the middle class. For many, the common elements of reform will provide comprehensive care and reliable coverage at little extra cost. As reform is whittled down to those basics, however, millions more might be denied the care they need and deserve. Is that what you want from health reform? Would you stand for it yourself?

USA TODAY · WEDNESDAY, JULY 6, 1994

Today's debate: INVADING HAITI

Go slow with any plans for using force in Haiti

OUR VIEW **Before any invasion, the administration must convince the public that it's needed.**

Inch by inch, the Clinton administration appears to be snuggling up to the idea of U.S. military intervention in Haiti. And that is not good news.

Today, four U.S. amphibious ships carrying 2,000 Marines head for waters off Haiti, ostensibly to provide the capability to evacuate safely its 3,000 U.S. citizens should conditions worsen.

Monday, U.S. envoy William Gray announced that no Haitians fleeing by boat will be resettled in the United States. Instead, the refugees will be kept in "temporary" safe havens in Panama and other Caribbean sites until peace is restored.

Both policy announcements hint something's about to change in Haiti.

It's unlikely Panama and other host sites would have agreed to accept thousands of Haitians unless they came with U.S. assurances the stay would be brief. The helicopter carrier USS Inchon and its sister ships bring the total of U.S. warships around Haiti to a threatening 13.

This is cause for concern.

There simply is not yet good reason to put U.S. lives at risk. Nor is it clear that military action would help, not hurt.

There is, however, real risk the administration will invent a pretext to invade.

A refugee "crisis" is the most convenient excuse. The swelling exodus of Haitian refugees — almost 6,000 last weekend — will create political pressure. But this was an expected result of Clinton's policy and, even so, 6,000 refugees is no flood. More than 90,000 Mexicans are caught trying to enter the U.S. illegally each month, but no one is talking about an invasion there.

Another excuse to invade is that Haiti remains, as President Jean-Bertrand Aristide calls it, "a house on fire" because of the repression from the military leaders who deposed him in 1991. But sanctions imposed to force these thugs from power have had little time to work. And conditions in Haiti, while deplorable, are far from unique.

Even by the administration's own standards, it has a long way to go before it establishes that invasion is the right answer. Those preconditions, enunciated by the president, say the U.S. must first:

▶ Convince the U.S. public of the compelling need. So far, polls indicate no appetite for intervention. In a CNN-*Time* poll in May, only 18% favored sending in military forces while 68% opposed it.

▶ Round up the support of Haiti's Caribbean neighbors and Latin American leaders. No matter how noble the cause, many in the region see U.S. intervention as a bitter cure. That's true in Haiti itself, where 19 years of occupation after the last U.S. military intrusion left the populace deeply suspicious of U.S. motives.

Perhaps in time conditions in Haiti will become so horrific that military action will become unavoidable.

But invade now? No. Neither Haiti nor President Clinton has proved the need.

Send troops to Haiti now

OPPOSING VIEW **Cedras never understood the niceties of diplomacy, so economic sanctions were doomed.**

By George Thompson

Heads up, all you worrywarts on USA TODAY's editorial board: You could not be more wrong than you are today. You should have paid attention to DeWayne Wickham's column here Tuesday. "Time to invade Haiti?" queried the headline. "Now" said he, and he could not have been more right.

He is so right that if my name happened to Lt. Gen. Raoul Cedras, I'd be on the next flight out of that beleaguered country.

That four-ship amphibious group we're sending to the Caribbean today includes assault helicopters, a tank-landing ship and everything else the 2,000 Marines aboard will need to better the odds that Cedras will not be there when they land.

It's about time.

As difficult as it is for this retired foreign service officer to say, invasion has always been the only choice.

Like most of his ilk, Cedras never understood the niceties of diplomacy, so economic sanctions were doomed from the start.

The powerful and the wealthy survive boycotts, embargoes and sanctions. Meanwhile, those who are neither powerful nor wealthy flood Florida's shores in such numbers that our own Gov. Lawton Chiles demanded federal aid to accommodate the rising cost of feeding and housing the refugees.

Anybody the least familiar with that tortured island could have told President Clinton that sanctions would worsen Haiti's already shattered economy and send the poor scurrying for the boats.

And none of this takes into account the terrible toll inflicted on hundreds of fleeing Haitians who have drowned when their jerry-built craft foundered en route to our sandy shores.

Invasion is, as it always was, the right thing to do.

But that decision is easy — however belated it might be. What is much more difficult to address is, what happens next?

We can fly exiled President Jean-Bertrand Aristide back to his native land, but to do what with what?

That's the tough question.

Given Clinton's track record in foreign affairs, it's questionable whether he or any member of his staff will come up with the right answer.

George Thompson is a Melbourne Village, Fla., writer and retired foreign service officer with Caribbean experience.

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BRUCE FEIN

A turn away from racial spoils

Last week the U.S. Supreme Court in Holder vs. Hall and Johnson vs. DeGrandy renounced twin interpretations of the Voting Rights Act that serenaded ugsome racial stereotyping and political polarization. Coupled with its ruling last year in Shaw vs. Reno (1993) frowning on gerrymandering to ensure a quota of racial minority electoral triumphs, the high court seems resolved to halt the nation's sinister slide toward a first cousin of political apartheid.

As Justice Clarence Thomas eloquently remonstrated in a concurring opinion in Holder: "The basic premises underlying our system of safe minority districts and those behind the racial voting register are the same: that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view. . . . [F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act. . . . [It] destroy[s] any need for voters or candidates to build bridges between racial groups or to form voting coalitions."

At issue in Holder was a single-commissioner form of county government in Bleckley County, Ga., adopted in 1912. The commissioner exercised all executive and legislative functions of county government. Blacks comprised approximately 20 percent of the county's eligible voting population, but no black had ever run for commissioner.

A handful of black registered voters and a local chapter of the National Association for the Advancement of Colored People assailed the single-commissioner system under section 2 of the VRA. It prohibits any "voting qualifications or prerequisite to voting, or standard, practice or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."

The complainants accepted that black voters in Bleckley County were treated evenhandedly regarding ballot access, registration and vote counting. Their grievance was the single-commissioner system that handicapped their ability to elect a black; voting in the county was allegedly racially polarized. A five member commission elected from five single member districts — one to be politically dominated by blacks — was demanded to attain proportional racial representation in the county government.

A federal appeals court sustained the demand, but the Supreme Court reversed by a narrow 5-4 margin. Writing for a plurality of three, Justice Anthony Kennedy explained that section 2 does not reach challenges to the size of a governing authority that allegedly dilutes the political potency of racial minorities. Such dilution claims necessitate arbitrary choices of benchmarks to compare with the size assailed that would leave the law in chaos. For instance, blacks in a jurisdiction where they comprise 5 percent of the voting population might insist on a benchmark of 20 single-member districts — one overwhelmingly black — to show a single commissioner system diluted their potential political clout. But nothing in the VRA provides guidance regarding selection of a benchmark, such as one guaranteeing proportional racial representation; indeed, the statute specifically renounces a group right of racial minorities "to have members . . . elected in numbers equal to their proportion of the population."

Justice Kennedy underscored the outlandishness of the racial dilution theory championed by the complainants in Holder. It would permit VRA attacks on the political boundaries of local jurisdictions by alleging that the annexation of surrounding land would enhance a racial group's voting strength, and that the failure to annex thus resulted in an abridgement of the right to vote on account of race.

The Holder decision is no license for overt or subtle electoral racism characteristic of Jim Crow. The court emphasized that the single-commissioner system would be unconstitutional under the 14th or 15th Amendment if adopted or maintained with a racially discriminatory purpose. The case astonishes only because four Justices embraced a VRA interpretation that would have catalyzed an epidemic of racial politics overseen by federal judges.

The Johnson case illustrates that infatuation with racial representation has no stopping point for the privileged beneficiaries. Hispanics in Florida brought suit under section 2 inveighing against that part of a districting plan for the state House of Representatives largely covered by Dade County. Of the 18 House districts predominantly located within the county, Hispanics constituted super-majorities in 50 percent, the same Hispanic percentage of the county voting-age population.

A group of Hispanic voters, joined by the Clinton administration, clamored for more than proportional ethnic representation; they demanded 11 majority-Hispanic House districts in Dade County because that might be accomplished without eclipsing the voting punch of blacks. In other words, they urged an interpretation of the VRA that would generally require districting that maximized the likely victories of racial or ethnic minority candidates beyond a number that reflected the proportion of their racial or ethnic cohorts in the voting-age population.

A federal district court agreed, but the Supreme Court reversed. Writing for the court, Justice David Souter observed that "equal political opportunity" was the mandate of section 2. He expressed bafflement at the contention that district lines yielding Hispanic political effectiveness in proportion to voting-age numbers nevertheless diluted Hispanic votes. Indeed, that theory of section 2 would condemn a districting scheme to elect 10 representatives that neglected to manipulate electoral boundaries to ensure that a racial minority comprising but 40 percent of the voting-age population constituted majorities in 70 percent of the districts, thus conferring effective political power 75 percent above their numerical strength.

Such absurdities, however, are replete in contemporary voting rights law and jurisprudence. The U.S. Supreme Court is the last serious impediment to a descent into omnipresent racial quotas.

Bruce Fein is a lawyer and freelance writer specializing in legal issues.

The Washington Times WEDNESDAY, JULY 6, 1994

AMOS PERLMUTTER

Broken promises of the Third World

The end of World War II brought not only freedom for Nazi-occupied Europe, but also an end to historical British, French, Dutch and later Portuguese imperialism.

The hope then and later was that the former colonies would go the way of democracy, parliamentarianism and pluralism, that a constitutional and stable order, buttressed by economic prosperity would emerge, resulting in a new world order of peace, security and tranquility. The transfers of this democratic Third World would be the Western liberal and socialist intellectuals of the former empires, linked to American academics who confidently predicted and imagined a pluralist, constitutional eruption of democratic states in North Africa, Africa, Southeast Asia and the Middle East as well as Latin America.

The emergent leaders of this new world were organized by the like of Abdul Gamal Nasser in Egypt, Kwame Nkrumah of Ghana, Sokarno of Indonesia, guided with the willing helping hand of communist leaders like Chou En Lai of China and Marshall Josip Broz Tito of Yugoslavia. The philosophy of this movement came from no less an eminent leader than Jawaharlal Nehru of India. They all claimed a new moral order of the emergent people of the Third World, straining to be free and superior to the dead values of Western capitalistic democracy. A 1955 Bandung conference and gathering of these new leaders fairly dripped with moral, ideological language and doctrines that brashly proclaimed their moral, political and intellectual agenda, condemning the West, imperialism, and all the old Western values and institutions. The institutions and values they would establish would of course be popular, honest, modernizing and inclusive. Their ally in all this was the "progressive" Stalinist and Khrushevite Soviet Union.

Their targets — the United States, capitalism, parliamentarianism and the multiparty system — were roughly and crudely dismissed in Marxist terms, described by Professor Harold Laski of the London School of Economics as corrupt, corrupting instruments of class and nationalist oppression and degradation.

The results, after all the intellectual, ideological and moralistic posturing, amounted to a sad, horrible reality that fall far short of the promise. In a matter of a few years, the Third World became a world of one-man dictatorships, military run revolutionary command councils, presidents-for-life and one-party states. Political stability was notified by a Marxist and Soviet jargon that became disastrous for the large masses of people who were victimized by it. Corruption was univeral, human rights were brutally suppressed, individual enterprise was destroyed by crude Marxist bureaucratic institutions, while military and civilian elites exploited their people in a way that their former colonial rulers never thought to imagine. They destroyed resources — mineral, natural and human — on an unimagined scale. Men on horseback — or tanks —became the rulers, men like Mobuto Sese Seko of Zaire, Idi Amin, Milton Obote of Uganda, Hafez Assad of Syria, Saddam Hussein of Iraq and Moammar Gadhafi of Libya, and others too numerous to mention.

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They professed neutrality, but played into the hands of the Soviet Union as pawns in superpower games. The result was economic disaster, with the further result of starvation, human suffering and population decimation.

As a series of articles in the New York Times last month demonstrated, economic bankruptcy, presided over by international economic institutions, was the rule, along with misery and deadly decline. The hope that some states would adopt some types of democracy proved a bitter disappointment, as experiments in Ghana, Nigeria and Togo resulted in ethnic strife and tribal warfare after attempts at democratic elections. The ironic result has been that democratic elections would be used as vehicles to power by Islamic fundamentalists in Algeria, Egypt and Jordan and the Gaza. In Sub-Saharan Africa, ethnic struggles of the most horrible sort were the results of democratic elections, with the singular exception of South Africa. The extreme case is Rwanda, but the scenario of porous and vague borders resulting in more warfare is also played out in Zaire, and in Ethiopia — where the Eritreans won separation and independence. Bad regimes were replaced by worse ones — exhibiting a facade of political stability, sustained by special guards and the military and the usual authoritarian instrument of suppression and terror.

Blithe advocates — both on the right and on the left — of democracy for the Third World should take stock of its consequences. The idea of individual freedom and free choice are at best a short-term exhilaration. Democratic elections resulted in the resuscitation of old ethnic and tribal rivalries that are not limited to the Third World. Ethnicity has been ruinous for the political future and stability of Eastern Europe, where a state system and bureaucracy already exist. For praetorian societies facing huge deficits as those in all African nations except South Africa, ethnic strife spells disaster.

It seem that after four decades since independence, the African states have failed to come to grips with and shed the praetorial legacy of their rulers, politics and institutions. The fact they can no longer play off the super-powers against each other only makes for a bigger impending tragedy.

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N.A.A.C.P. Leader Tries To Build a Bridge to Youth

Chicago Meeting Finds Group at Crossroads

By DON TERRY
Special to The New York Times

CHICAGO, July 12 — When the Rev. Benjamin F. Chavis talks about reaching out to the young and the disillusioned in black America, he is talking about people like 22-year-old Alturo Rhymes.

Mr. Chavis is the executive director of the National Association for the Advancement of Colored People, which is holding its annual convention here this week, but as far as Mr. Rhymes and his buddies are concerned, the 85-year-old civil rights organization might as well be called the National Association for the Advancement of Middle-Class and Old Colored People.

"I don't see the N.A.A.C.P. as an organization for the masses of black people, and that's the problem," said Mr. Rhymes, who lives in a city housing project named after an early civil rights crusader, Ida B. Wells. "They're looking for that mainstream, middle-class person who doesn't need half as much help as the people I know. The N.A.A.C.P. is lost on the Yellow Brick Road somewhere."

For much of the last year, his first as executive director, Mr. Chavis has been trying to gather the young into the N.A.A.C.P. fold as part of an effort to broaden its membership across age, class and even ideological lines. He has crisscrossed the country, attending street gang peace conferences and marching for the preservation of historically black colleges.

He lived in a housing project for a couple of days in South-Central Los Angeles, urged "gangsta" rappers to stop using sexist and violent lyrics, and shared a stage, and a hug, with Louis Farrakhan, the minister of the Nation of Islam, an organization that has a grip on the hearts and imaginations of many in the inner city.

Reaching Out

Today, Mr. Chavis continued his campaign into the "hood." After Vice President Al Gore addressed the N.A.A.C.P.'s convention, and after a videotaped message of support from President Nelson Mandela of South Africa, Mr. Chavis visited a youth anti-drug program, No Dope Express, on Chicago's far South Side, far from the convention's posh downtown hotel

Chavis's efforts to inspire the poor upset others.

ano the scores of teen-aged N.A.A.C.P. members bound for college.

On Wednesday, Mr. Chavis is scheduled to travel even farther than he did today, at least symbolically. He is expected to visit the sprawling Cook County Jail complex, home to a small army of largely poor, young, black and Hispanic people.

"We're attempting to reconnect to the masses," Mr. Chavis said. "We're trying to remain on the front lines of the struggle."

His outreach policy is not without critics. They say he is ignoring the N.A.A.C.P.'s traditional middle-class base and its successful strategy of court action and political organizing.

"Reaching out is essential, and I applaud that," said Denton L. Watson, a former director of public relations for the organization. "Chavis means well, but he has to be careful. He cannot succeed by discarding the traditional way the N.A.A.C.P. functions."

That sentiment was shared by Julian Bond, who was a young leader of the civil rights movement in the 1960's before becoming a Georgia state legislator. "I hate to hear people say the N.A.A.C.P. needs a new direction," said Mr. Bond, who was a member of its national board of directors for 10 years. "It has delivered real benefits to black America. I don't see any reason it should change."

Associated Press

At the N.A.A.C.P. meeting yesterday, Vice President Al Gore stressed the Administration's commitment to civil rights.

Mr. Bond said the N.A.A.C.P. has long had youth and college programs. Indeed, Mr. Chavis first joined when he was 12 years old.

But the N.A.A.C.P. has also long been accused of being out of step with the times.

"The March on Washington was wonderful," said Donavan Wheatfall, 18, of Fort Worth, who came to the convention to participate in the N.A.A.C.P.'s academic and cultural competition for high school students. "But we have new problems — drugs, poverty, hopelessness and crime. Just reciting the speeches and replaying the march won't do it. Dr. Chavis is leading us in the right direction."

Peggy Demon, 45, who brought her 16-year-old son, Ronald, from Florida to compete in the academic contest, sounded more cautious. "I like Ben Chavis, but I'm just watching to see what he does next," she said.

Mr. Chavis says that membership has increased from about 490,000 last year to 675,000 this year and that most new members are young. But if Mr. Chavis hopes to sign up people like Mr. Rhymes and his friends at the Ida B. Wells public housing development, he may have a lot of convincing to do.

Harsh Reality

The housing development occupies a gritty patch of earth, and more than 90 percent of the 5,660 people who live there get public assistance. Only a few manage to send their children off to college and decent jobs.

On Monday night, as the N.A.A.C.P. was handing out medals for the top finishers in the academic competition, the park fieldhouse at Wells was full of basketball players. Gil Walker, the recreation director for the city housing authority, was leaning against a wall when a 19-year-old walked in to say he could not play.

The teen-ager pulled up his shirt to show the bandage on his lean belly and the round hole on his back that had been sealed shut. He had been shot the other week, walking down the street to buy a hamburger.

"Anybody else get shot?" a young man asked him.

"Everybody outside did," he said. "He shot 17 times."

Mr. Walker patted the teen-ager on the shoulder.

Post-Post Cold War

With the Century's Big Battles Over, Clinton Finds Europeans a Bit Jaded

By THOMAS L. FRIEDMAN
Special to The New York Times

News Analysis

BERLIN, July 12 — When President Kennedy visited West Berlin in 1963, the more than one million Berliners who turned out to greet him were the largest crowd he had ever seen. So large, in fact, that Mr. Kennedy said that when he left office he was going to leave his successor a sealed letter to be opened only when things got really bad at home. The letter would read, "Go to Germany."

Times have changed. What has been striking about Mr. Clinton's trip through Europe this week, including Berlin, is how muted the response has been. From Latvia, to Poland, to Italy, to Germany, the crowds have been substantial at times, but never huge, always embracing but hardly ecstatic.

The explanation, though, seems to have little to do with Mr. Clinton. It is much more a statement about this moment. To put it simply: the cold-war era, when cheering an American President in Berlin was as much an act of defiance against the Soviet Union as an expression of affection for the United States, is over.

The Euphoria Is Over

And the euphoria of the immediate post-cold-war world is also over — the days when an American President could whip a crowd into a frenzy

From Riga to Warsaw to Berlin, the crowds are hardly ecstatic.

by describing that land of milk and honey that lay ahead once Europe was free of the Communist yoke.

Today is the post-post-cold-war era, when the main questions being debated are: "Who takes out the garbage?" and "What have you done for me lately?"

As the cold war was coming to a close, those who lived under Communism in Eastern Europe had enormous expectations about what lay ahead, and they were eager to hear from an American leader about what it looked like on the other side of the hill.

Well, they are now on the other side of the hill. They know what it looks like, and it looks complicated. The view takes in Bosnia, free markets — with all of their opportunities and uncertainties — unemployment, inflation and a Western Europe that is hesitant to open its markets to their products or NATO to their armies.

Maybe that is why a young Russian-born Latvian named Paul reacted to President Clinton the way he did in Riga last week. Paul is a 25-year-old married to a Latvian woman, but was being denied Latvian citizenship because of his Russian ancestry. As he listened to Mr. Clinton extol the virtues of democracy for Latvia, Paul just shook his head and said, "I'm not buying it."

Leaders Seem to Have Shrunk

What Mr. Clinton seems to have discovered on this trip is that in Europe he has inherited a moment when most of the heroes of the cold war have ridden off into the sunset, the credits have rolled and America is neither protecting Europe nor liberating it anymore.

In the eyes of the public, everyone seems to have shrunk three sizes. When aides told President Clinton that the approval rating of President Lech Walesa of Poland had sunk to 5 percent in Polish public opinion polls, Mr. Clinton responded, "Five percent? No one can be that low!"

Much has been made of the fact that because Mr. Clinton has focused his Presidency on domestic policy, he has deprived himself of one of the traditional sources of Presidential authority: foreign policy.

That is true enough. But what this latest tour underscores is that even if Mr. Clinton had chosen to concentrate more on foreign policy, it is questionable whether it would have given him the authority boost it has other presidents.

If Harry S. Truman and Dean Acheson were "present at the creation" of the cold-war world, Bill Clinton and Warren Christopher are "present at the adaptation" of the post-cold-war world. That is, they do not have the challenge, or the opportunity, of building institutions from scratch — like NATO or the General Agreement on Tariffs and Trade.

They must try to adapt these institutions at a time when the Europeans have a much stronger say in what should go into them, when economic resources are scarce and when there is no Soviet enemy over the horizon to nudge the European allies into line. If the world is now safe for small wars, it is also safe for greater discord among the allies.

An Embarrassing Moment

When Mr. Clinton offered a proposal at the Naples economic summit meeting to begin talking about the issues not dealt with in GATT — like financial services — he was spurned by the six other leaders, who thought the idea premature. The President was forced, rather embarrassingly, to take his proposal off the table.

Throughout this trip Mr. Clinton cajoled the Western Europeans to open their economies to more exports from Eastern Europe, as America has from Mexico. Otherwise, he said, capitalism will never take root in Poland or Ukraine. But the West European countries have soaring unemployment, and their leaders made clear to Mr. Clinton that they were reluctant to allow imports that could cost them a single job at home.

When President Kennedy went to West Berlin, the dollar was firm and strong. Today it fluctuates wildly against the German mark and Japanese yen. The era of fixed exchange rates is gone.

The cold-war world was characterized by governments dominating their economies, and no government was more dominant than America's. The post-cold-war world is characterized by free markets. It is the markets that dominate the governments today. It is a time when all governments can do less, not more.

No wonder, then, that the little-noticed theme that ran through Mr. Clinton's speeches here was a call for a new kind of courage, one that draws its energy from mundane daily acts of individuals — a civil courage.

"The challenges our generation faces are different than those our parents faced," Mr. Clinton told the Polish Parliament. "They are problems that in many cases lack pressing drama. They require quiet and careful solutions. And if we meet them well, our reward will not be stunning moments of glory, but gradual and real improvements in the lives of our people.

"We must find the will to unite around these opportunities of peace, as previous generations have united against war's life-or-death threats and oppression's fatal grip. To the courage that enables men and women to drop behind enemy lines, face down rumbling tanks or advance freedom's cause underground, we must add a new civil courage — the energy and optimism and patience to move forward through peaceful but hard and rapidly changing times."

HEADLINE The Changing Focus of Civil Rights
Byline: ANDREW KULL
DATE 07/20/94
SOURCE THE BALTIMORE SUN (BSUN)
Edition: FINAL
Section: EDITORIAL
Page: 11A
Category: OP-ED, COMMENTARY
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The civil-rights movement ended in success a generation ago, much as the anti-slavery movement, a century earlier, concluded with emancipation. We have been reluctant to let it go.

The most contested racial issues of today, involving interest-group politics among racially identifiable groups, are commonly dressed in the mantle of "civil rights." This is not because there is anything dishonorable about interest-group politics, but because "civil rights" makes a more attractive banner than, say, "proportional representation."

"The struggle continues," declared Jesse Jackson not long ago to 700 demonstrators in Augusta, Georgia. (The occasion was a rally in support of Georgia's policy of drawing congressional districts to facilitate the election of black candidates.) "We must never say 'the civil rights movement' in the past tense."

The refusal to distinguish yesterday's causes from today's may be rhetorically attractive, but it deprives us of needed perspective. Like the abolition of slavery, the realization of civil rights for black Americans was a monumental and irrevocable political achievement that revealed, at the very moment of success, a road ahead as arduous as the one that had just been traveled. Civil rights, "equality before the law," no more assured "equality in fact" than did emancipation. And this realization has been long and unwelcome.

The lingering expectation that lawyers and judges should be at the heart of the movement for racial justice reflects the experience of a century in which black Americans were denied even the strictly legal equality that the Constitution (with the addition of the Fourteenth and Fifteenth Amendments) appeared to guarantee. The evident contradiction invited a resolution by litigation.

Southern states (as well as Congress, in its government of the District of Columbia) provided public education in separate, unequal facilities. A combination of law and custom imposed segregated transportation. (The Interstate Commerce Commission appeared before the Supreme Court in 1950 to defend segregated train travel.) Hospitals, recreational facilities and prisons remained segregated; President Truman's orders desegregating the military and the federal civil service were issued only in 1948. Much of the Deep South, ignoring the Fifteenth Amendment, prevented black citizens from registering to vote.

This was the heroic period in American civil-rights law. For "civil-rights law" inevitably changed once civil rights were attained.

By the end of the 1960s, the NAACP Legal Defense Fund was pressing new demands -- for an "equality of results," measured by

proportional outcomes -- that were inconsistent, in important respects, with its traditional arguments based on the principle of non-discrimination. The new course, set a generation ago, has led to an ever-widening divergence between the claims advanced in the name of "civil rights" and the older civil-rights ideal.

School desegregation cases after the mid-1960s, when the federal government finally moved against Southern intransigence, became the entering wedge of "race-conscious remedies." In 1954, Brown v. Board of Education had simply prohibited the assignment of school pupils by race. But In 1968 the Supreme Court interpreted Brown to require racial balance in formerly segregated school districts. A new meaning was given to the word "desegregation."

Similarly, in the area of employment discrimination, the federal courts effectively revoked the political compromises that had secured passage of Title VII in 1964, substituting for the congressional command of nondiscrimination a far more interventionist statute favoring the hiring and the advancement of women and minority workers.

It seems unlikely that significant progress toward racial equality will henceforth be the work of the courts. The reason is not that judges' politics have changed, but that the problems we now confront lie outside the judges' reach. Especially when they are enforcing constitutional rules, it is far easier for courts to prohibit action than to require it. It is easier, moreover, for a court to direct the reallocation of existing resources than to command the assembly and expenditure of new ones. Such tools were adequate when the problem in view was unequal treatment at the hands of government. They are of little use against social inequalities not attributable to present-day discrimination. So long as the problem of race was still the problem of civil rights, the political agenda was clear; but we cannot expect solutions of judges when we remain, ourselves, at a loss for what to do.

Seen from our present perspective, the most striking feature of the civil-rights arguments of 40 years ago was the reason most prominently advanced for the unconstitutionality of segregation -- the forceful contention that laws making a racial classification were constitutionally impermissible. In short, that the Constitution was color-blind.

The LDF's consolidated brief on the re-argument of the school-segregation cases, submitted in late 1953, announced as its first contention that "distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment." The argument was pursued: The Fourteenth Amendment "prohibits a state from making racial distinctions in the exercise of governmental power," reflecting "abhorrence of race as a premise for governmental action." Thurgood Marshall, Jack Greenberg and their colleagues urged the court to decide the school cases on the basis of "this court's basic premise that, as a matter law, race is not an allowable basis of differentiation in governmental action. . . . That the Constitution is color-blind is our dedicated belief."

Quotations in this vein might easily be multiplied. Jesse Jackson's version of the continuing struggle suffers by comparison with Martin Luther King Jr.'s. The beauty of civil rights as a political program was that it asked for nothing that it did not

claim for everyone. In reorienting its political objectives from nondiscrimination to entitlements, the liberal position in racial politics surrendered the universality that was an attractive part of its moral claim.

Jack Greenberg remained the director of the Legal Defense Fund long enough to find himself picketed by the "Third World Coalition" at Harvard Law School in 1982, when he taught a course on "Racial Discrimination and Civil Rights." The objection was that he was not "a Third World professor." (The Harvard Black Law Students association found him "especially inappropriate" as an instructor because of "his adamant refusal to relinquish directorship of the NAACP Legal Defense Fund to a black attorney.")

Mr. Greenberg writes in his new book, "Crusaders in the Courts," that he "scorned" the boycott leaders for their "racist enterprise." He bristles when he recounts that the New York Times, reporting his appointment as LDF director in 1961, headlined the fact of his race, "the least relevant aspect of my persona."

The phrase is an uncanny echo of the way we used to talk. And yet, when Mr. Greenberg resigned in 1984, it was surely inconceivable that a white lawyer would succeed him as director of the LDF. Courses in race-relations law are regularly offered at Harvard Law School, but no white professor has taught them since Mr. Greenberg. Either the Third World coalition was slightly ahead of its time in 1982, or Harvard was slightly behind.

Something was gained, then, and something lost, in the change of attitude. The political and intellectual transformation reflected nothing less than a redefinition of the baseline of racial justice. Present-day demands for proportional entitlements are offered as merely the new phase of a continuing struggle for civil rights. But to equate the two causes is to ignore everything that has been gained, and everything that has been given up.

Andrew Kull is the author of "The Color-Blind Constitution." This article first appeared, in longer form, in The New Republic.

HEADLINE Charlottesville bans gay bias
DATE 07/19/94
SOURCE RICHMOND TIMES-DISPATCH (RCHD)
Section: AREA/STATE
Page: b-3
Origin: CHARLOTTESVILLE
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The Charlottesville City Council voted unanimously last night to change the city code to prohibit discrimination against homosexuals.

The change makes the city one of a few in the state that legally ban such bias.

At its July 5 meeting, the majority of the council members strongly endorsed the change to the code.

The ordinance will prohibit discrimination based on "sexual orientation" in employment and in awarding contracts.

The council made its decision despite a protest last night by the Rutherford Institute, a religious civil-liberty organization based in Charlottesville. The Rutherford Institute argued that the city should vote against the change or at least provide an exemption in the public procurement section of the code for those people who hold a sincere religious belief that homosexuality is a sin.

TAKING ISSUE

BY STUART TAYLOR JR.

Blazing a Trail Out of the Voting-Rights Brawl

On June 28, 1993, in *Shaw v. Reno,* the Supreme Court held that it is presumptively unconstitutional (and too much like "political apartheid") for states to manipulate voting-district lines for the purpose of moving black or Hispanic voters toward proportional representation—at least if the resulting shapes are "bizarre."

On June 30, 1994, in *Johnson v. De Grandy,* the Court suggested that the Voting Rights Act may often *require* states to manipulate voting-district lines for the purpose of moving black or Hispanic voters toward proportional representation.

What's a state supposed to do? Comply with the Voting Rights Act by violating the Constitution? Comply with the Constitution by violating the Voting Rights Act?

Or try to thread the needle, by somehow divining what the Court will deem too "bizarre" a shape, and then designing districts to pass that test (barely), while coming as close as possible to creating majority-minority enclaves in numbers proportionate to the racial makeup of the relevant population?

As the law now stands, many states (and courts) are likely to choose the latter course. They will extract from the voting-rights jurisprudence of the Rehnquist Court a peculiar touchstone: Go for proportionality, but don't be too bizarre about it.

This sorry (not to say bizarre) state of affairs is what happens when a badly splintered Court—with warring camps that seem to talk past one another rather than to seek common ground—confronts an issue that calls for statesmanlike accommodation of two conflicting imperatives.

The first imperative is that Congress has properly decreed that in places where racial bloc voting predominates, majority-black and majority-Hispanic districts must sometimes be created to protect these traditionally underrepresented groups from having their voting power negated or diluted by submergence in a sea of whites.

The second imperative is that if we are ever to get away from racial politics and bloc voting, we must resist efforts to make race the main criterion in districting. That's because even remedial race-based districting carries the heavy costs of encouraging politicians to appeal only to members of their own race and of putting the law's imprimatur on the notion that people are expected to vote along racial lines.

The Court's liberals—Justices Harry Blackmun, now departed, and John Paul Stevens—sometimes seem to see the Voting Rights Act as a mandate for wholesale proliferation of race-based electoral districts, despite the danger of thereby entrenching the very racial bloc voting that the liberals deplore, and despite the act's explicit disclaimer of any "right to have members of a protected class elected in numbers equal to their proportion in the population."

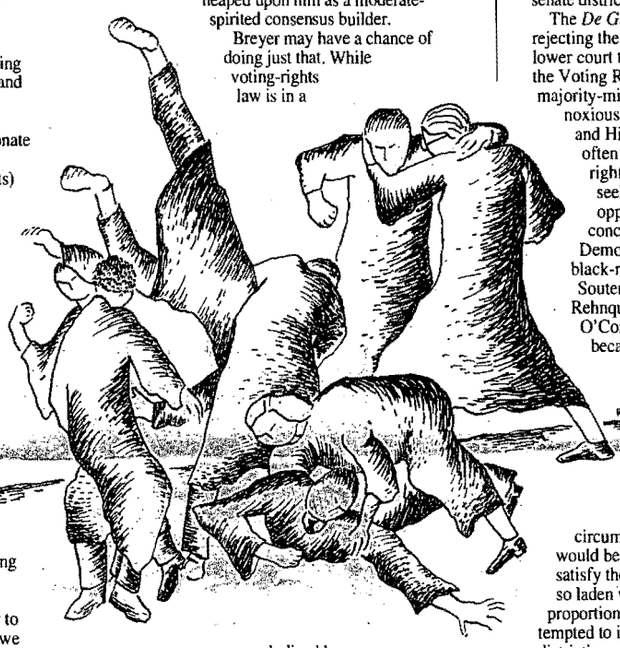
The Court's two most ardent conservatives—Justices Clarence Thomas and Antonin Scalia—understandably abhor the racial spoils system that they see being ushered in by liberals, but have reacted in a lawless and dishonest way:

In *Holder v. Hall,* handed down the same day as the *De Grandy* ruling, Thomas (joined by Scalia) argued with passion and cogency that by "segregating the races into political homelands," the courts are moving toward the functional equivalent of "a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race." But rather than seeking a stopping point consistent with the Voting Rights Act, Thomas' 59-page concurrence flouts the utterly clear intent of Congress (not to mention 25 years of Supreme Court precedent) by disingenuously claiming that the act provides no remedy for dilution of minority voting power in racially polarized, majority-white districts.

The swing justices on this issue—Sandra Day O'Connor, Anthony Kennedy, David Souter (and, perhaps, Ruth Bader Ginsburg)—seem to be groping for a moderate middle course. But so far they have not been able to agree on much. Ginsburg has not yet spelled out her views. And O'Connor and Kennedy have lurched back and forth without signaling a clear sense of where they want to go.

If Justice-nominee Stephen Breyer can import some coherence and common sense into this confusion—by steering a principled path between the Scalia-Thomas colorblind absolutism and the liberal lust for racial enclaves—he will deserve the praise his admirers have heaped upon him as a moderate-spirited consensus builder.

Breyer may have a chance of doing just that. While voting-rights law is in a mess, symbolized by O'Connor's atrociously muddled opinion for the 5-4 majority in *Shaw,* both that decision and Souter's opinion for a unanimous Court in *De Grandy* represent a fundamentally healthy rejection of the extreme liberal view.



Meanwhile, the extreme conservative view of Thomas and Scalia has no chance of prevailing. They could not even win over Chief Justice William Rehnquist, their usual ally. While he has never seen a race-conscious remedy he didn't hate, Rehnquist apparently could not swallow Thomas' transparent effort to gut the Voting Rights Act in the guise of literalist "interpretation."

The challenge for Breyer will be to help shape the Court's muddled middle into a solid center, and to help Souter complete a project on which he made a decent start in *De Grandy*: guiding lower courts to use the strong medicine of race-based districting as a remedy when absolutely necessary, while taking great care to avoid an overdose.

De Grandy is remarkable (although so far largely unremarked upon) for the rare unanimity with which the Court rejected the position of the Justice Department. Solicitor General Drew Days III had argued that Florida must seek proportionate representation of all the Hispanic people scattered across *the entire state* by drawing as many Hispanic-majority districts as possible in the Dade County area (where the largest concentrations of Hispanic voters live).

Here's hoping Breyer will team up with Souter to devise a coherent blueprint.

The Justice Department would, remarkably, have required the state to give Hispanic and black voters in the Dade area *more than* proportional representation, while fragmenting white neighborhoods so as to submerge *all* non-Hispanic whites in the Dade area into black-majority and Hispanic-majority state senate districts.

The *De Grandy* Court was also unanimous in rejecting the holding of the special three-judge lower court that, wherever racial bloc voting exists, the Voting Rights Act mandates creation of as many majority-minority districts as possible. This noxious doctrine of "maximization" of black and Hispanic voting power at all costs had often been invoked not only by liberal civil-rights lawyers and minority politicians seeking safe seats, but also by opportunistic Republicans seeking to concentrate black voters (who tend to vote Democratic) into a relatively small number of black-majority districts.

Souter was able to get justices ranging from Rehnquist to Blackmun (as well as Stevens, O'Connor, and Ginsburg) to sign his opinion because all agreed that minority voters cannot generally claim vote dilution when the districting plan creates majority-minority districts "roughly proportional to the minority voters' respective shares in the voting-age population."

Souter cautioned that in some circumstances such proportionality, by itself, would be neither necessary nor sufficient to satisfy the Voting Rights Act. But his opinion is so laden with approving references to proportionality that states and lower courts may be tempted to infer that relentlessly race-based districting up to the point of proportionality is the safest course.

This would be a mistake. As Souter's opinion also warns, a "race-conscious calculus" tends to "promote and perpetuate efforts to devise majority-minority districts even in circumstances where they might not be necessary to achieve political and electoral opportunity." Souter also stresses, rightly, that "minority voters are not immune from the obligation to pull, haul, and trade to find a common political ground [with members of other groups], the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics."

And *Shaw* (in which Souter dissented) stands for the salutary principle that excessive use of race-based districting raises concerns of constitutional dimension. O'Connor's seeming fixation in *Shaw* on the snake-like shape of one North Carolina congressional district is best seen as reflecting a more general constitutional presumption that states cannot make race the *overriding* criterion in redistricting, to the point of ignoring traditional standards like compactness, contiguity, and respect for political subdivisions.

Here's hoping that in the next big voting-rights case, Breyer will team up with Souter and perhaps others to reconcile the constitutional holding of *Shaw* with the Court's seemingly disconnected interpretations of the Voting Rights Act, and to devise a coherent blueprint for creating majority-minority districts when—and only when—they are clearly necessary to remedy very substantial vote dilution.

Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer *magazine. "Taking Issue" appears every other week in* Legal Times.

PHOTOCOPY
PRESERVATION

God and the crime bill

So God wants the crime bill passed, does He? President Clinton didn't say where he had gotten the Word, but in an appearance at the Full Gospel A.M.E. Zion Church in Temple Hills Sunday he demanded that Congress "do the will of God" and pass the crime bill. Not a version stripped of the more controversial and wasteful provisions that led to its defeat last week, mind you. No, God, like Mr. Clinton, apparently wants the whole thing.

One can just imagine the outrage that would have resulted if, say, Ralph Reed of the Christian Coalition had headed for the pulpit to announce that his legislative agenda had the Almighty's imprimatur. Obviously, there's a certain amount of hypocrisy involved here. But this holier-than-thou approach to politics, so typical of the First Family, is also another unpleasant reminder that the Clintons simply do not believe there is room for reasonable people to disagree with them. Anyone who does is profane — meaning set apart from God.

For the more secular-minded out there, Mr. Clinton claims that critics have set themselves apart from police. "Now the Republicans say, well, there's too much money for prevention in this bill," he said in his weekly radio address. "They call it pork. Well, all I know is, all the police officers in this country know we need to give kids something to say 'yes' to."

Well, what do God and the police think of the bill's $10 million handout for a new National Criminal Justice Center in the district of Democrat Jack Brooks? It's an important question because the handout won't end there. As a press release from Lamar University, recipient of the $10 million, put it, "In 1986, Brooks and then-Senator Lloyd Bentsen had written into the Superfund Bill language that authorized $5 million to create the Gulf Coast Hazardous Substance Research Center. Since that time, the research center has received more than $16 million in federal funding."

Then there is the $20 million "Hope in Youth" program mentioned in this space previously. Actually the word "youth" appears exactly twice in the entire section, including the title. "Hope in Left-wing Activists" is more accurate, since it would fund "advisory organizations" to provide, among other things, a "multi-issue forum for public policy discussion." This is walking-around money for liberal activists to lobby for still more money.

And what about the $125 million for Juvenile Drug Trafficking and Gang Prevention Grants? The grants are supposed to "reduce juvenile involvement in organized crime." But aside from a few references to sports activities and "artistic enrichment," it's not clear how the $125 million is supposed to do that.

To Washington Post reporter Kenneth Cooper, complaints about pork-barrel spending in the crime bill are just cover for the real objections of the Republicans and 58 Democrats who voted against the crime bill last week. Their real problem is the crime bill's gun-control provisions, he "reported."

No doubt it's true that many lawmakers doubt that taking guns from law-abiding citizens will do anything to reduce crime. But complaints about pork are not new. Wisconsin Republican James Sensenbrenner Jr. wrote an April 6 column in the Commentary pages of this newspaper noting that the "House crime bill has several defects, but perhaps the worst defect is the $8 billion going to social-welfare programs . . . . I say they are a waste of money." Apparently a lot of Republicans agreed because more than 100 voted against the bill that month even though it included no assault-weapons ban.

The respective Senate and House crime bills cost $22 billion and $28 billion. Conferees "compromised" and settled on a total of $33.2 billion. So if anything there was even more pork than before.

If Mr. Clinton wants to turn his moral minority into a majority, he ought to strip out the pork and the gun-control measures and give lawmakers a chance to vote on a measure that could really do something about crime. Editors here can't claim a higher authority for such a bill, but one suspects voters would say, "Amen."

Henry Cisneros' war on the Constitution

Henry Cisneros and Roberta Achtenberg think they have the right to put a homeless shelter or a home for addicted AIDS sufferers or for alcoholic ex-convicts in the house next door to you —whether you like it or not. In fact, the Housing secretary and his assistant secretary for Fair Housing and Equal Opportunity really don't think you have the right not to like it. Or, if you perhaps may be permitted to disapprove the plan in the privacy of your own heart, you surely, by their lights, have absolutely no right at all to say so publicly.

Take Alexandra White, Joseph Deringer, and Richard Graham, of Berkeley, Calif. For a year and a half now, the three have been under investigation by Mr. Cisneros' Department of Housing and Urban Development. They have been threatened with more than $100,000 (each) in fines, and there have even been hints of possible jail time. Their crime? Violation of the Fair Housing Act — specifically the Fair Housing Act Amendments of 1988, which forbid housing discrimination against the disabled.

And are Ms. White, Mr. Deringer (her husband), and Richard Graham toney real estate agents or rich landlords, or even private homeowners refusing to rent properties to the deaf, the blind, the wheelchair-bound? Not exactly. The three are simply residents of a Berkeley neighborhood, already suffering to a certain extent from urban blight, who objected to the opening of a homeless shelter there. And they are residents who expressed their opposition very vocally, at meetings, in newsletters and fliers, in letters to the editor and even in a lawsuit (unsuccessful) against the city's zoning board.

Now, under the Fair Housing Act Amendments of 1988, alcoholism, drug addiction and AIDS, as well as mental illness, are all conveniently designated "disabilities." Refusing housing to persons suffering from any or all of those complaints — and most of the homeless are — is, thus, illegal. And to quash the objections of ordinary citizens to seeing their neighborhoods overrun by drunks and junkies, HUD has simply decided to declare that speaking freely of those objections is a crime as well. In addition to enduring threats about fines and incarceration, thus, Ms. White and Messrs. Deringer and Graham have been ordered to turn over everything they've ever written on the subject of the proposed shelter, their files, minutes of all meetings of their neighborhood coalition and the coalition's membership list — to the Department of Housing and Urban Development.

Nor are the Berkeley Three, as they have come to be known, alone in suffering such abuses at the hands of HUD. From Manhattan to New Haven, Conn., to Kansas, the long arm of HUD has reached out to threaten and even to impose fines on citizens who pursue a course of public opposition to its plans. This seems to go over fine with Secretary Cisneros and Assistant Secretary Achtenberg. They're both on record promising to enforce the Act to the hilt. And when a lawyer for the Berkeley Three wrote to Mr. Cisneros and Ms. Achtenberg, asking them to put a stop to the strong-arm tactics against his clients, the two secretaries just referred the case back to the San Francisco office, where it had all begun.

John J. Phillips, a spokesman for that office, seemed to sum up HUD's attitude nicely, when he asked a New York Times reporter, "What's the difference between you saying the words that advocate for the door to be slammed in the face and the big ugly landlord slamming the door in the face?"

The difference, for Mr. Phillips' information, and Mr. Cisneros and Ms. Achtenberg may want to bone up on this as well, is that here in the United States, we have a little thing called the Constitution. And to that Constitution there is a little thing called the First Amendment. And that little amendment guarantees the right of American citizens to voice their opinions of government programs, of political figures, of just about anything in fact, unmolested by the government.

The Washington Times TUESDAY, AUGUST 16, 1994

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PAUL CRAIG ROBERTS

Nefarious fans in the bleachers

The Democrats who are trying to revive the defeated crime bill should stop and consider that its greatest beneficiaries are drug dealers. This is a very curious result for a bill that is supposed to be anti-crime.

It is extraordinary that 210 members of the U.S. House of Representatives voted for a "crime bill" that veteran front-line federal prosecutor Jay Apperson calls "the drug dealer's best friend" and that Clinton-appointed FBI Director Louis Freeh criticized for its cutbacks of FBI and Drug Enforcement Administration personnel.

Mr. Freeh told the Buffalo News Aug. 10 that one of the ways in which the crime bill pays for itself is by cutting back on the FBI and DEA in order to fund liberal spending programs that are supposed to lead young people away from crime. Thus, liberal hopes are substituted for real law enforcement capability. Moreover, the promised 100,000 additional police officers are unfunded and constitute just another Clinton lie.

Pulling DEA agents off the job, of course, is a boon to drug dealers, but this benefit is minor compared to the bill's repeal of the only tool that law enforcement officials have for getting high-level drug lords convicted — the mandatory minimum sentence.

Before mandatory minimum sentencing was put into the law, drug pushers served short sentences. This enabled the higher-ups who control the traffic to shield themselves behind the small fry who would continue to be paid while serving their time.

The mandatory minimum changed all of this. Now the small fry can face up to 10 years unless they cooperate with authorities and finger the bosses who organize the business. Jay Apperson says the mandatory minimum is the "most effective law enforcement tool in convicting high-level drug suppliers and traffickers." It is very curious that the crime bill does not target drug lords but, instead, targets the only tool that has made it possible to convict them.

Mr. Apperson says the crime bill also rewards the drug dealers by retroactively freeing those already convicted and sentenced under the mandatory minimum. He says the mandatory minimum applies to dealers, not users, and that the picture critics have drawn of users drawing stiff prison terms is false.

Because Congress was rushed to vote on a bill before the members knew what it contained, our legislators almost passed a bill whose main beneficiaries were drug lords. It was a near miss. If Mr. Clinton and the Democratic leadership continue to push this defeated crime bill, it could raise questions whether drug money is finding its way into the political process. Considering the way special interests control legislation, many in the public will not believe that legislation whose greatest beneficiaries are drug dealers is an accident.

Paul Craig Roberts, a distinguished fellow of the Cato Institute, is a columnist for The Washington Times and is nationally syndicated.

Hugh Price at the Urban League

The National Urban League has a new president and chief executive officer in the person of Hugh B. Price, who succeeded John E. Jacob. For much of its 84 years, the Urban League has been an organization whose absence of bombast gave it a somewhat lower profile than most civil rights groups. But Mr. Price's tenure seems to be promising to turn up the organization's volume. But precisely no in a bombastic fashion. The new tone and message could prove eventful and inspirational not only for the League, but for others who are struggling sincerely to repair the stubborn problems plaguing the poor and inner cities.

Mr. Price's leadership already has rekindled a debate among many civil rights voices over the extent to which racism is the real crippler of many black communities. He set the stage for that discussion last month in Indianapolis, in his first appearance before the League as its president. He assured patrons that the focus of the League's attention will remain as always on the "millions of our people who remain stuck on the escalator, headed nowhere, or worse." He noted that racism stubbornly remains a reality for too many people — in employment, housing, lending and other aspects of life. But then he cut a refreshing path.

Mr. Price cautioned, "We must not let ourselves, especially our children, fall into the paranoid trap of thinking that racism accounts for all that plagues us." It is a courageous message, one attuned to reality at a time when race-baiting is a popular sport. "This ruthlessly competitive world waits for no nation, no ethnic group and no individual," he says. And although Mr. Price is no proponent of free-market economics, he understands that people must also take responsibility for themselves.

Of course, there are those who will misunderstand that message and consequently shout it down. It would be tragic to lose the point. It is always easier to repeatedly articulate the problems and point the finger of blame than to do the hard work of fashioning a strategy to fix what is wrong.

The League long has had a strategy for fixing what is wrong. It regards strengthening individual economics as the first line of defense in an increasingly competitive world. The organization's emphasis on self reliance is the hallmark of any great nation. Surely, it can work for individuals.

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The Washington Times

DATE: 7-14-94
PAGE: A-16

Cuomo throws a curve

CAL THOMAS

NEW YORK

Gov. Mario Cuomo has thrown a curve ball at Republicans in the State Assembly, trying to strike them out over the death penalty.

Gov. Cuomo, who has vetoed death-penalty legislation for 12 years and is now seeking re-election to a fourth term, has proposed that the Assembly let voters decide the issue by referendum. He wants the ballot to offer three choices.

In addition to the death-penalty option, voters could choose to impose life in prison without the possibility of parole. If they approved the third option, the state would retain its current "life" in prison law, which allows for parole after some time has been served.

A recent New York Daily News poll found that 74 percent of voters favor capital punishment and only 23 percent oppose it. But a Quinnipiac College poll found that when New Yorkers were asked to choose a maximum penalty for first-degree murder and were given three options, 44 percent chose life without parole, 40 percent chose the death penalty and 11 percent chose life with parole. The rest had no opinion.

Mr. Cuomo likes the odds that this poll suggests. He charges that Republicans don't like his suggestion of life without parole because they only want a yes-or-no vote on the death penalty so that they can hang onto the clear political advantage this gives them over a three-option ballot measure. Divide and conquer is the governor's approach.

His reasons for opposing the death penalty, while consistent, are wrong. He says that it brutalizes society, that it does not deter, that it is an "irreversible act of retribution" and that innocent people can be mistakenly put to death.

Mr. Cuomo believes that life in prison without parole is a punishment that fits the crime of murder. It does not. It is like taking away someone's ice cream as a penalty for stealing a car. Depriving someone of liberty, even for the rest of his life, is not a sufficient penalty for taking the life of another human being. To suggest that it is devalues the life that has been taken; indeed, it sends a message to society that life is cheap, or less dear than it used to be.

When Mr. Cuomo says that capital punishment is an irreversible act of retribution, he probably is confusing retribution with revenge. Actually, retribution is defined as "recompense" or "reward." It implies there are wages to be paid for certain acts, and the wage or "reward" for killing an innocent person must be the surrendering of the guilty person's life. How else to make amends not only for the innocent blood that was shed, but also to the relatives of the deceased?

Society does not take revenge on those it puts to death by due process. Our criminal-justice system lays out an orderly process with built-in safeguards that ensure —with an extremely high probability — that only the guilty pay the price.

Mr. Cuomo's argument in favor of life without parole is that such a law "will make New York a safer place." This implies that there is a fixed number of killers, and that getting those now committing murders off the streets and into prison will guarantee fewer killers. But killers are bred, not born. Removing some of the current bunch does nothing to curtail the making of new ones.

Mario Cuomo

The death penalty does not brutalize society. Murderers brutalize society. The death penalty is society's response to this brutalization. It is a matter of justice. It is the way society maintains a high view of human life. There are other crimes, or series of crimes, that can land one in prison for life. Capital punishment is a way to set the crime of murder above all other categories and to say that this act is one for which only one penalty is sufficient.

Is life in prison without parole better than the current system under which some killers are paroled only to kill again? It is, and if that is all Republicans can get from this Democratic governor, they should settle for what he proposes.

Of course, there is always the fall election, and a Republican could unseat Gov. Cuomo. But Republicans in the Assembly should not wait for the uncertain results of that balloting in hopes of passing a straightforward yes-or-no death penalty law. That would mean settling for the unacceptable status quo just so they can keep a political issue alive for their own benefit.

Cal Thomas is a nationally syndicated columnist.

THE NATION'S NEWSPAPER
USA TODAY

DATE: 7-14-94
PAGE: 13-A

Death penalty politics

A clever cop-out for politicians who don't have a handle on crime

LOS ANGELES — The death penalty is absurdly dominating the debate about crime in this political season.

Candidates who oppose the death penalty are running for cover, promising to enforce it even if they oppose it (Kathleen Brown in California), even offering to give up authority over the issue to voters (Mario Cuomo's proposed constitutional referendum in New York).

Candidates who support the death penalty are sure to pounce. You can just see the ads. Child killers. Kidnappers. "She's weak. He's soft. Vote for me. I'm tough."

COUNTERPOINTS
By Susan Estrich

Not so fast.

Last year, more than 24,000 people were murdered in the USA. Thirty-eight murderers were executed — the highest number in 30 years. Most people know that executions in America are rare events, and that's unlikely to change regardless of who is elected. So why give so much weight to the death penalty?

People in politics believe that the death penalty is a powerful issue because it is also a measure of values. The death penalty is the symbol of toughness in fighting crime at a time when toughness is what frightened and angry Americans rightly want. Whose side are you on? Are you as angry as we are?

I can't think of a serious or successful politician today from either side of the aisle who would have a moment's pause answering those questions. Certainly not Mario Cuomo or Kathleen Brown. They're not on the criminals' side. They're just against the death penalty.

I'm for it. Maybe it's motherhood that did it. If it saves one child, it's enough for me. Even if it doesn't, people who do truly terrible things, people who are evil, deserve to be punished.

I used to worry that the system couldn't administer death fairly. Now I worry more about how many people it lets get away with murder.

But the death penalty is only one question. Being against it doesn't mean you're weak, and being for it doesn't mean you're tough.

The death penalty isn't really a measure of toughness; it's an avenue for copping out, a way to avoid the really hard questions rather than an answer to them.

The truth is that most crimes never get solved in the first place. Most people get away with it, most of the time. And most of the rest, who are caught and prosecuted, end up pleading guilty to offenses much less serious than the ones they committed. That's how the system stays afloat, barely. How do you catch more criminals, and make it stick?

We don't trust judges, so we take their discretion away. When a really terrible guy comes along — a guy like the one who is charged with kidnapping and killing Polly Klaas — they have no power to throw the book at him, at least until the third strike. And then we blame them for his release.

Around 3% of all murderers are sentenced to death. Most killers get seven years or less. Seven years. And it's not just men who kill their wives.

Nearly half of our prison beds are occupied by non-violent drug offenders. Should we be letting out killers to make room for drug offenders? Isn't that what we're doing right now?

Sentences are often meaningless. The victim's family hears 15 years to life and doesn't realize that it means parole in seven to 10. They feel betrayed.

We've all been betrayed. All the tough talk in politics, and all the mandatory minimums and enhanced sentences, helped create the system we hate. Nobody's sentence gets cut. You can only build so many prisons so fast, so the prisons get overcrowded. In the middle of the night, in a technical bill, everyone's sentence gets cut in half. The parole board keeps the prison system afloat by letting people out.

And despite all this, politicians will spend this season debating the death penalty.

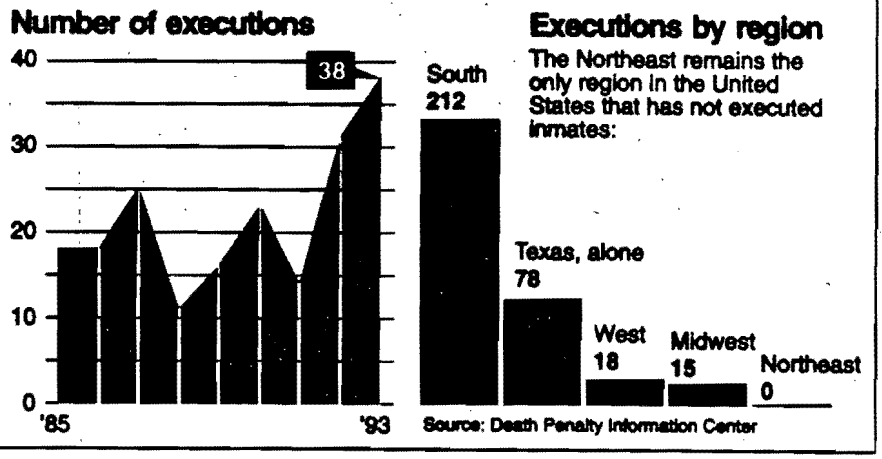
Former deputy attorney general Phillip Heymann has been arguing, since his resignation, that spending billions to build new prisons, as Congress and the administration appear intent on doing, just won't cut crime. It's an argument worth having. It's also a point he apparently could not make publicly until he resigned. Not tough enough, presumably, for today's political climate. That's the problem with today's climate.

Tough talk is cheap. The death penalty is an easy answer. We shouldn't let politicians off the hook so easily. This is the season to ask the harder questions.

COUNTERPOINTS' four columnists provide views from diverse perspectives on today's issues. **Mondays:** Tony Snow. **Tuesdays:** Michael Gartner. **Wednesdays:** Linda Chavez. **Thursdays:** Susan Estrich.

Facts about the death penalty

Since the death penalty was reinstated in 1976, states have carried out 245 executions. Here's the trend since 1985:



Source: Death Penalty Information Center

By Sam Ward, USA TODAY

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THE NATION'S NEWSPAPER
USA TODAY

DATE: 7-7-94
PAGE: 2A

NAACP's Chavis feeling the heat — inside and out

By Desda Moss
USA TODAY

The NAACP was inundated with calls from would-be members last month after Executive Director Benjamin Chavis convened a black leadership summit.

For Chavis, the calls were vindication — proof that his efforts to reinvigorate the nation's oldest and largest civil rights group are on track. Even the censure Chavis received for including Nation of Islam leader Louis Farrakhan in the summit couldn't offset it.

"There's no question the summit created momentum," he says. "We have repositioned ourselves to the front lines of the civil rights movement."

But his critics, inside and outside the NAACP, aren't convinced.

Insiders see him as an erratic maverick and worry that Chavis is leading the organization down a blind alley of mounting debt, strained resources and loss of support from its middle-class core.

Outsiders, including numerous Jewish groups, are unsettled by his overtures to Farrakhan and left-wing radicals, fretting they can't see where Chavis intends to lead the organization whose name is synonymous with civil rights.

"The issues confronting the black community today don't compel embracing someone who espouses racial hatred," says activist Julian Bond, a former national board member. "Inviting Farrakhan sent a terrible message."

And, as the group prepares to open its annual convention on Saturday, some old-guard members are so incensed that they're promoting a move to oust Chavis and board chairman William Gibson, a Greenville, S.C., dentist, and Chavis' closest ally on the board.

"I see growing dissatisfaction over the financial management of the association and the perceived re-direction of the NAACP away from being an integrationist organization," acknowledges board member Joe Madison, a Washington, D.C., radio talk show host.

Even detractors agree that Chavis' problems are compounded by fissures within the black community over priorities and strategy.

"In the '60s, there was a coherent plan, although not as coherent as people remember in retrospect," says David Bositis, a senior political analyst with the Joint Center for Political and Economic Studies, a think tank. "Today, there's disagreement not only about the means, but about the ends."

The divisions came into view when 100 business, community and religious leaders invited to the black leadership summit June 12-14 in Baltimore, failed to agree on an action plan.

Standard-bearers such as Coretta Scott King and Joseph Lowery, president of the Southern Christian Leadership Conference, were no-shows.

The summit will reconvene in August.

But, underscoring Chavis' problems within his own organization, the NAACP's national board has yet to approve the meeting.

Even if the ouster move fizzles, Chavis is expected to face a grilling from the board when it meets during the convention in Chicago. The issues:

▶ His controversial alliances and independent streak.

Besides his connection with Farrakhan, Chavis was chastised in April for holding an unauthorized meeting with more than 40 pan-African and black nationalist leaders in Detroit. And earlier this year, the board passed a resolution condemning "gangsta rap" only days after Chavis held a forum to defend it against censorship.

"Part of Chavis' problem is that he doesn't consult the board enough on directions that he takes prior to taking them," says Madison.

▶ The association's finances. The NAACP is about $3 million in debt, a shortfall that has prompted layoffs of at least 10 employees with more to come.

▶ Membership. Chavis says he's increased dues payers by 25% since last April — from 490,000 to 652,000. But others question his claims and say the so-called membership boom hasn't produced a corresponding increase in dues revenue.

Chavis dismisses threats of his removal as "loose talk" and says he has the overwhelming support of the 64-member board: "There are always naysayers. . . . We've lived through periods of negative publicity."

Some NAACP members say the financial problems can be accounted for by Chavis' ambitious agenda, which includes environmental issues.

"It's a different approach to civil rights and it takes time," for says board vice chairman Ben Andrews.

Meanwhile, Chavis wants to increase the presence of black elected officials at the next summit, noting, "That's certainly one category of leadership we're concentrating on."

Asked whether efforts would be made to draw in black conservatives, he was less enthusiastic: "I don't foresee that."

Old-line NAACP members see Chavis' flirtations with the radical left and separatists of any stripe as disturbing.

"The NAACP should be leading the fight for integration; instead it's courting gang members and supporting Afrocentric schools and defending racially identifiable colleges," says Michael Meyers, spearheading the ouster effort.

What's at stake, he says, "is no less than the future of the NAACP as a moderate, integrationist civil rights beacon."

Los Angeles Times

DATE: 7-7-94
PAGE: A5

Comment

ON THE NATION

Civil Rights—the Graying of a '60s Dream

BY JONATHAN FREEDMAN

Thirty years after passage of the Civil Rights Act of 1964, a young black man is more likely to be arrested than hired. The thrust of affirmative action, to help minorities get jobs, has given way to repressive measures to put them in prison. And racism and tribalism, rising among minorities as well as whites, have supplanted the ideal of a color-blind society.

Somewhere along the road to equality, the underlying faith in law to liberate people from oppression was lost in the rancorous conflict over racial quotas. Now America has embraced a new-found faith in punitive laws, like California's "three strikes," that make it easier for young minorities to spend life in prison rather than in the workplace.

Affirmative action did not cause this backlash, but the hopes it raised—and dashed—played a part. In the 1960s, idealistic Americans believed that whites should pay for the oppression of the past by giving minorities a leg up. But by the 1980s, complaints over so-called reverse discrimination spawned a Bakke-to-bigotry counter-revolution against affirmative action. In the economic decline of the 1990s, blue-collar whites feel like an endangered species and sullenly resent concessions for minorities and women.

The Civil Rights Act of 1964 was a good law that gave entitlements a bad name. Title II, barring segregation in public facilities, was enormously successful in smashing Jim Crow laws separating the races in the South. Title VII, setting hiring goals and timetables, helped integrate many government agencies and private corporations. But Title VI, barring discrimination in programs that receive federal funding, failed utterly to fulfill its promise.

The most controversial civil-rights provision, affirmative action, recruits minorities for jobs in traditional white bastions, such as fire stations. But resistance against it was skillfully manipulated to recruit disgruntled whites into a conservative coalition that undermined integration and shoved minorities deeper into poverty. As a result, the minority unemployment rate is higher now than in 1964, and has stubbornly remained twice as high as white unemployment for 30 years.

Socially, affirmative action provided a vehicle for advancement—the black middle class doubled in size—but with the hidden stigma of entitlement. Economically, it favored those who received higher education and pursued professional careers over those who dropped out of school and took menial jobs. Affirmative action helped a minority of blacks and Latinos to move up, leaving the rest behind.

Ironically for working stiffs, affirmative action opened up jobs in smokestack industries doomed to extinction by the post-industrial revolution. They entered the door only to find the factory was being shut down and the job shipped overseas.

Unskilled black and Latino workers were the hardest hit by the shift from a society that made real things—and paid living wages—to one geared to virtual production.

Today's backlash against civil rights eerily echoes the post-Civil War period. The 1860s, like the 1960s, were a time of progressive change when slavery was abolished and blacks were given equal protection under the law. But Southern whites increasingly disregarded the newly won rights of black Americans, and by the 1880s, *de jure* discrimination had returned. In 1883, the Supreme Court forbade Congress from outlawing racial discrimination practiced by individuals; in 1896, in Plessy vs. Ferguson, the court permitted "separate but equal" accommodations for blacks.

A century later, white America is turning its back on integration, and even circumspect blacks are favoring separatism. Our sagging commitment to civil rights is embodied by figures in prison denims. For every complaint of discrimination filed with the Commission on Civil Rights, a hundred criminal charges are filed against minorities. Progress has been arrested literally in the persons of youths rounded up because police suspect their color. Individuals may be guilty of unlawful acts, but a whole generation is being scapegoated for America's failure to live up to the 1960s' hope of affirmative action.

A civil-rights law alone cannot free people from discrimination if the spirit of the public is bitter and hate-filled—or simply indifferent. As lawmakers inflated with demagoguery enshrine the ugly mood of fear and resentment into repressive laws, the only consolation is that the spirit of civil rights will endure and flourish once again—if today's backlash doesn't totally condemn the next generation.

Jonathan Freedman is a writer in San Diego.

Los Angeles Times

DATE: 7-7-94
PAGE: A10

The Right to Have a Job

Sexual orientation is not relevant in employment

If you are denied a job because of your race, religion or gender, legal remedies are available to you. The law is on your side. But if you are denied a job because of your sexual orientation, you are without legal remedy in 42 of the 50 states.

Legal remedies would be unnecessary, of course, if discrimination did not occur. But it does occur. When Barbara Boxer was elected to the Senate in 1992, Peter Teague moved from San Francisco to Washington to take a position on her staff. His companion, a lawyer with a thriving practice, went with him expecting to find work easily. Interviews with law firms went well until the inevitable question about why the move had taken place. The answer cooled the initial warmth to "Don't call us, we'll call you." Teague's partner now has a job, thanks at least in part to a District of Columbia law that forbids job discrimination on the basis of sexual orientation. California has such an anti-discrimination law too.

But can protection against job discrimination be extended to all homosexuals as a matter of federal statute? Last month the Human Rights Campaign Fund, an organization defending gay and lesbian equality at the federal level, announced that it had written confirmation from 71 of the 100 U.S. senators that they would not discriminate on the basis of sexual orientation when hiring for their Senate offices; 234 of 435 U.S. representatives have made the same promise.

These promises undoubtedly reflect the legislators' conscience on this matter. They should vote their consciences when the Employment Nondiscrimination Act comes before them later this summer. This legislation, which has 32 sponsors in the Senate and 107 in the House, exempts small businesses, religious organizations and the military. It requires no quotas or preferential treatment of any kind. It does not require that employers pay spousal benefits for same-sex partners. It merely requires that no one be denied employment because of sexual orientation.

People should be hired or fired on the basis of their work. The Times urges swift approval of this modest and reasonable measure.

The Washington Times

DATE: 7-7-94
PAGE: A-17

Women in mortal combat in the battle of the sexes

It was left to Rep. Randy "Duke" Cunningham of California, a Republican member of the House Armed Services committee, to protest: "I consider the lack of respect shown to these military officers personally deplorable." The officers, who believed they were following orders of their commander-in-chief (and maybe Mrs. Clinton, too) simply said they had other job aspirations when they joined the military.

Suzanne Fields

But why so much noise about a little domestic service by military men when there are scarier problems of military readiness? The Navy has redecorated combat ships to accommodate women, and Adm. Jeremy Boorda, the new chief of Naval operations, may next remove the ban of women on submarines, one of the last of the all-male bastions at sea.

It's expensive to redesign the tight space in a submarine, and close quarters raise problems of sexuality and discipline, so sensitive the Navy doesn't even want to talk about it, but Adm. Boorda thinks it will help recruitment. Is he serious? Attitude trends suggest combat obligations reduce a woman's incentive to sign up.

In an annual Youth Attitude Tracking Survey, supported by the Pentagon, only 11 percent of women said they would be "more likely to enlist" if women were assigned to combat ships. Fully 25 percent said they would be "less likely to enlist." (Some men may be more eager to join the women, but for all the wrong reasons.)

Women are now eligible to fly combat planes. With sea and air services offering equal opportunities, shouldn't ground troops be entitled to a little help from women, too?

A sexy young woman in a low-cut sailor collar adorns a recruiting poster, circa 1918: "Gee!!" she says. "I wish I were A Man. I'd join the Navy, Naval Reserve or Coast Guard."

Well, now she can. If she's an officer assigned as one of the military aides to the White House she may even get to serve the hors d'oeuvres, just like a man.

That's what happened when President and Mrs. Clinton ran short of help in the middle of a White House reception. Four White House military aides in uniform were pressed into service to carry trays of canapes for the fanciest of Washington's guests to nibble with their cocktails. Feminists who long ago refused to serve coffee for their bosses have so far said nothing.

Secretary of the Army Togo J. West Jr. thinks so. He has recommended in a confidential memo to Secretary of Defense William Perry that women serve as combat engineers, artillery operators and crewmen on commando aircraft. He even wants women to operate the Multiple-Launch Rocket System and to pilot helicopters in combat in enemy territory. He cites "career opportunities" for women as the justification.

Critics, including many combat veterans, are aghast. They argue that women will not only face direct contact with hostile fire and physical contact with the enemy if they join field artillery units, but will jeopardize the men because their specific physical needs requiring privacy and the lesser physical abilities will put both sexes at risk.

(But what do testosterone-aggressive sexist pigs, veterans of real warfare, understand about "career opportunities"?)

Secretary West wants to require co-ed basic training in the Army "to enhance gender cohesion." That's a fine phrase of gobbledygook, but a real enemy could quickly reduce the politically correct obfuscation to blood, sweat and tears. Do red-blooded 20-year-olds really need tutoring in "gender cohesion"?

In an annual Youth Attitude Tracking Survey, supported by the Pentagon, only 11 percent of women said they would be "more likely to enlist" if women were assigned to combat ships.

Gen. Gordon R. Sullivan, the Army chief of staff, says Secretary West's confidential memo goes beyond anything field commanders consider prudent, and Mr. West is looking for ways to compromise — to save face and maybe even lives.

This woman-in-combat issue won't go away. Nor will the foolishness of certain women seeking to reduce men to a lower physical level in the military.

To accommodate Shannon Faulkner, The Citadel, the South Carolina military college, wants her to get a crew cut and move into a private room in the infirmary, away from the male cadets. She prefers longer hair and a room in the barracks, but with a separate bath. No male cadet can visit her alone in her room.

And when the going gets rough, and there's a social crisis, who will serve the hors d'oeuvres?

Suzanne Fields, a columnist for The Washington Times, is nationally syndicated. Her column appears here Monday and Thursday.

House Polishes Procurement Legislation

'Electronic Commerce' Network Is Mandated

By Stephen Barr
Washington Post Staff Writer

THE WASHINGTON POST TUESDAY, JUNE 21, 1994

The House bill to streamline the way the government buys goods and services envisions widespread use of "electronic commerce" and seeks to encourage innovative procurement practices by setting up pilot projects, according to a draft document circulating on Capitol Hill.

Federal agencies spend about $200 billion a year buying products that range from routine office supplies to complex weapons systems. Vice President Gore has made procurement streamlining one of his top legislative priorities this year because it would fulfill recommendations made in his "reinventing government" report and speed efforts to shrink the federal bureaucracy.

House committees—led by the Government Operations and Armed Services panels—worked yesterday to wrap up a comprehensive, bipartisan bill that would promote federal purchases of off-the-shelf commercial products, cut paperwork requirements for small purchases and revise numerous contracting procedures.

The House legislative effort has been underway, in one form or another, for the last four years. Among the House members who have helped shape the most recent measures are Reps. John Conyers Jr. (D-Mich.), Ronald V. Dellums (D-Calif.), William F. Clinger Jr. (R-Pa.), Floyd Spence (R-S.C.), James H. Bilbray (D-Nev.), John M. Spratt Jr. (D-S.C.) and Carolyn B. Maloney (D-N.Y.). They hope to bring the bill to the floor within the next two weeks, aides said.

Many of the House provisions mirror the Senate's procurement bill, passed earlier this month. But there are a few key differences that likely will require intensive negotiations between the House and Senate.

One of the major differences involves "electronic commerce"—a catchall phrase used to describe a new process for small government purchases based on a network of computer bulletin boards, fax transmissions and other, more sophisticated data interchange systems.

The House bill would require the administration to establish a "federal acquisition computer network" known as FACNET within five years, according to the draft of the legislation. FACNET would provide public notice of contract solicitations, accept responses and requests for information, allow public notice of contract awards and make payments to contractors through electronic funds transfer or other automated methods.

The idea, officials said, is to move another part of the government into the information age and create a paperless procurement process for common purchases.

President Clinton endorsed electronic commerce last October as a way of streamlining purchases of less than $100,000. According to an administration task force report, electronic commerce would bring lower prices, increased competition, reduced lead time for purchases and better inventory control.

The more than 300,000 suppliers who do business with the government—particularly small businesses—would find increased opportunities to participate and improved operating and payment processes, the task force said. The proposed network also would present what officials call a "single face" to companies doing business with the government, reducing the specialized requirements that agencies now impose on bidders and sellers.

Clinton called on government agencies to pursue electronic commerce in two phases. Agencies are expected to begin conducting some of their business on an electronic basis by Sept. 30 and then make "all appropriate federal government purchases" to the maximum extent practicable on the new network by January 1997.

Vendors and industry officials are skeptical that the administration can meet that timetable or the one specified in the House bill. An administration official acknowledged that agencies are on a "forced march" to meet the deadlines but said the administration hopes "to have a system seriously up and running" in 1997.

The House bill also stipulates that another provision of both the House and Senate bills—an increase in the "simplified acquisition threshold"—cannot occur until FACNET is operating.

The bills would raise the threshold from $25,000 to $100,000, a change the administration believes would reduce paperwork and staff time devoted to common purchases. The Senate Armed Services Committee calculated that purchases less than $100,000 account for about 16 percent of the government's procurement expenditures but make up more than 95 percent of the procurement actions.

The administration appears to lean toward the Senate bill's approach to electronic commerce, because it does not set deadlines or link the computer network to the purchase threshhold.

According to the draft, the House bill departs from the Senate measure by providing for nine pilot projects to test innovative purchasing techniques. The bill also would let the Transportation Department test alternative procurement procedures under the Airway Capital Investment Program, a potentially important move because the administration has proposed spinning off the Federal Aviation Administration as a quasi-governmental corporation that would be run like a business.

The House bill also provides a more expansive definition of "commercial items"—in effect, products that can be bought off-the-shelf. The House definition includes so-called commercial services, such as security guards or 800-number phone lines, that are common in private business.

The bill's intent is to nudge agencies away from drawing up detailed specifications and ordering customized products or services when less expensive alternatives are easily purchased from stores or vendors.

The House bill was bogged down in a jurisdictional dispute between Government Operations and Armed Services committees for a time, but those issues apparently have been resolved. Committee aides, pointing to bipartisan support, hope the measure can be brought up under special rules that forgo debate or amendments. That will move the House into a negotiating conference with the Senate, beginning the final legislative round that officials hope will end with a White House signing ceremony this summer.

"Fundamentally, what this reform effort should produce is a system of doing business with the federal government which is more simple and understandable, particularly for small business on one hand, and more accountable for taxpayers on the other hand," said Conyers, chairman of the House Government Operations Committee.

Clinger, ranking Republican on the committee, has called the proposed changes a step toward "regaining common sense." Taxpayers deserve a procurement system that does not slow federal access to state-of-the-art technology and does not force companies to alter standard procedures, he said.

"It is especially important to note," Dellums said earlier this year, "that this is, and has been, a bipartisan endeavor."

D.C. Lawyer Nominated To U.S. Appeals Court

Clinton Notes Commitment to Civil Rights

THE WASHINGTON POST TUESDAY, JUNE 21, 1994

By Sharon Walsh
Washington Post Staff Writer

President Clinton yesterday nominated Washington lawyer David S. Tatel, who has been involved in the desegregation of schools and universities across the country, to fill a long-vacant seat on the U.S. Court of Appeals for the District of Columbia.

Tatel, 52, a partner in the law firm of Hogan & Hartson, was hailed by Clinton as a a nominee with "an extraordinary record of dedication" and "a lifelong commitment to protecting and preserving the rights of all Americans."

He is a former director of the National Lawyers' Committee for Civil Rights Under Law and was head of the office for civil rights in the Department of Health, Education and Welfare in the Carter administration.

Tatel, who declined to comment on his nomination yesterday, has been blind for 20 years because of a degenerative eye disease. He is a native of Washington and a graduate of the University of Chicago Law School, where he was a member of the law review.

He made his mark as a young lawyer in the late 1960s as director of the Chicago Lawyers' Committee for Civil Rights Under Law. The committee was formed in 1963 at the request of President Kennedy to make the resources of the private bar available to those seeking enforcement of civil rights.

Tatel became the organization's national director in the 1970s. In that role, he worked with Lloyd N. Cutler, who has been White House counsel to Presidents Carter and Clinton and who was instrumental in his nomination.

"I've known him for years and think very highly of him," Cutler said recently. "He's a remarkably good lawyer and has a fine judicial temperament."

If his nomination is approved by the Senate, Tatel will fill the seat on the court vacated by Ruth Bader Ginsburg when she was tapped for the Supreme Court last summer.

The 12-member federal appeals court, which hears appeals from the federal court in the District, is widely considered to be the country's second most important court, after the Supreme Court, because it also hears appeals from the rulings of federal agencies. Its decisions on appeals from agency rulings have national implications on issues ranging from what cable television operators can charge, governed by the Federal Communications Commission, to the obligations of employers under civil

See TATEL, B7, Col. 1

TATEL, From B1

rights laws, policed by the Equal Employment Opportunity Commission.

Two justices now on the Supreme Court, Ginsburg and Clarence Thomas, were appointed from the appeals court.

Tatel may be one of the Clinton administration's most applauded nominations, according to civil rights advocates and court watchers. Advocates and adversaries alike say his well-honed skills as a negotiator in emotionally difficult school desegregation cases will serve him well on the court.

He was praised not just for his fine legal mind and civil rights work, but for the richness of his life.

"I put great stock in judges as human beings," said Milwaukee lawyer Michael J. Spector, who represented suburban school districts opposite Tatel in a case there. "He's deeply committed to his family and friends—no matter how busy he is."

Tatel behaves, say friends and colleagues, as if his blindness did not exist, and they are quick to point out that Tatel wants to be known as a remarkable lawyer who happens to be blind, rather than as a remarkable blind lawyer. He has run the New York and Marine marathons (linked to a partner's arm by a shoetring), skis on both snow and water, sails, hikes and windsurfs. If his nomination is confirmed, he will have a personal reader to work with him, as he does now at his law firm.

"David doesn't brood about his blindness," said his friend and running partner Larry M. O'Rourke, a lawyer and journalist. "But he can tend to brood about the flow of events, like rising racial hostility. His interest in those subjects is deep."

Tatel, hired at the office for civil rights by then-HEW Secretary Joseph A. Califano, was a strong advocate for the integration of public schools and college systems. He visited black colleges in North Carolina to show the press that their students were inadequately served.

"Most lawyers don't call things as they see them until they're on the bench and can't be fired," Califano said. "David will be a very special judge because he's been doing that all his life.

After leaving OCR and returning to Hogan & Hartson in 1979, Tatel began to build a practice focusing on educational issues. In one of his first big cases, he helped the St. Louis school system comply with a court order to desegregate.

Because there was no way to desegregate within the school district, Tatel helped establish the first interdistrict voluntary desegregation plan, involving the city and 24 suburban districts. Now, more than 11,000 African American students voluntarily attend suburban schools, and about 1,000 white students go to city schools.

Tatel now heads a practice group of 16 lawyers who represent school systems and universities across the country in the areas of desegregation, free speech and scientific research.

Tim Dyck, a lawyer specializing in First Amendment issues at Jones, Day, Reavis & Pogue, said he didn't see Tatel's nomination as a political move but as "an appointment of high quality. . . . He's a considerable intellect."

The appointment is Clinton's second to the court. His first appointee was Judith W. Rogers, former chief judge of the D.C. Court of Appeals, who already has joined the court. If Tatel is approved, the court will have seven Reagan and Bush appointees and five Democratic appointees, in what some lawyers have described as an unusually fractious group of judges.

"There are very strong personalities on this court and not a fluttering heart among them . . . about reversing the lower courts," said E. Barrett Prettyman Jr., one of Tatel's law partners and a court watcher whose father was a judge on the court.

"I guess David will be a central force in that court, much the way [David] Souter is on the Supreme Court because he's extremely fair-minded," Prettyman said. "I don't think he comes to the court with a particular agenda."

Even those who would have liked to see a more conservative appointment, praised Tatel.

"He's not a Bruce Babbitt or a Mario Cuomo who hasn't thought about or written about the law in many years," said conservative constitutional scholar and lawyer Bruce Fein, referring to the secretary of the interior and the governor of New York, both of whom have been mentioned for appointments to the Supreme Court.

"He's fair-minded and not a zealot," said Fein, who said he would have preferred a more conservative choice.

Robert A. Adler, a lawyer and friend of Tatel, said, "He's a better appointment than even the White House thinks."

LEGAL TIMES

DATE: 4-25-94
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COURTSIDE

BY TONY MAURO

Tribe Drives Home Points in Honda Case

If the revolution ever comes and the need arises to kidnap the Supreme Court, there is only one man for the job: Harvard University law Professor Laurence Tribe.

Tribe proved once again on April 20 that there is no one better at capturing the Supreme Court, captivating it, and making it look at a case in an entirely new and sympathetic way.

Tribe argued on behalf of the injured party in *Honda Motor Co. v. Oberg*, No. 93-644. Karl Oberg, hurt while driving a Honda all-terrain vehicle, was awarded $735,512 in compensatory damages and $5 million in punitive damages. The issue before the Court: What power, under the due-process clause, must appeals courts have to review and set aside punitive-damages verdicts rendered by juries?

Andrew Frey of the D.C. office of Chicago's Mayer, Brown & Platt argued first, for Honda, in a strangely unfocused way. He seemed to be thrown off stride almost immediately with questions from the bench, questions he should have been able to answer.

Frey, who spoke apparently without notes, began with a recitation of big damages awards that were reduced on appeal—the Texaco-Pennzoil verdict and the like. It was an odd beginning, but it seemed to invite precisely the questions that Chief Justice William Rehnquist and Justice Sandra Day O'Connor immediately asked: What standards did the various states use in setting aside those verdicts?

"I'm not sure," said Frey—and then continued that his point was that if the cases had been tried in Oregon, the courts would have lacked the power to set aside the awards.

After that faltering start, Frey never really recovered. He fought the questions—never a good strategy—sometimes repeating them in a disdainful tone, as if he was mulling over whether they were worth taking time to answer. He seemed unwilling to give the Court a bottom-line description of what kind of review of punitive damages the Constitution really requires.

When Justice Antonin Scalia asked Frey for citations to "your best cases" for the proposition that jury verdicts should be reviewed by appellate courts, Frey at first shot back, "Your opinion in *TXO*"—referring to *TXO Production Corp. v. Alliance Resources Corp.* (1993)—to which Scalia replied, "I didn't cite cases, and I might have been wrong." Scalia wanted older cases, but Frey resisted.

Finally, Scalia asked, "You're going to give me your best cases, aren't you?" and Frey replied, "No," referring the justice to his brief.

Frey was able to convey to the Court that some kind of review for excessiveness is required by the Constitution, but his stingy presentation left the Court without much to go on—and left the justices well primed for Tribe.

Where Frey was stingy, Tribe was generous, giving the Court a dazzling list of citations for every proposition he advanced—chapter and verse, including obscure Oregon decisions. It was all the more amazing considering that Tribe came into the case only in the last few weeks.

Tribe's main contention was that the Oregon system already provides all the review that the Constitution requires—a view of the world that is completely different from Honda's, and a view that basically ends the case if the justices agree with Tribe.

And it's likely they will. Rehnquist and Scalia asked Tribe about the sharply different renditions of the Oregon situation contained in his and Frey's briefs. Rather than playing up the differences, Tribe minimized them—and set out to convince the Court that his version was right. Strategically, this was the right thing to do: It relieved the Court of having to decide in great detail which lawyer was right about what happens in Oregon.

When Scalia asked Tribe what evidence he had showing that Oregon indeed does allow for review, Tribe cited three Oregon cases without hesitation, and then said that even the Honda case proved the proposition. "This case has been tried since 1989 on the premise that review is available," said Tribe.

With unwitting help from Frey, Tribe was thus clearly trying to portray Honda as a sore loser who claims the process was unfair only because it did not win.

Tribe explicitly criticized Frey's fuzzy presentation at one point, telling the Court with despair, "I don't know what they're asking today." And he helpfully answered Scalia's earlier question to Frey, gleefully citing a 1764 English case, *Beardmore v. Carrington*, which said that the courts there had never granted a new trial because of excessive damages.

Repeatedly, Tribe ridiculed Honda's argument as an impossible quest for a way of deciding when an award is unconstitutionally excessive.

"How much is too much?" Tribe asked sarcastically. He cited a line from the drama "Amadeus," in which the emperor criticizes a piece of music by saying, "There are too many notes."

Tribe evidently liked the line well enough that he repeated it later in his argument to make sure the justices got it.

Perhaps when the Court rules, it will announce a new "Amadeus standard" for punitive-damages review.

If the oral arguments are any indication, that standard will look more like what Tribe said already exists than what Frey seemed unwilling to ask for.

The Pro Se Way

The old adage that the lawyer who represents himself has a fool for a client is not always correct.

Silvia Ibanez, a solo practitioner from Winter Haven, Fla., proved that it sometimes works, when she ably represented herself at the Supreme Court in the oral arguments April 19 in *Ibanez v. Florida Department of Professional Regulation, Board of Accountancy*, No. 93-639.

She was arguing that the Board of Accountancy violated her free-speech rights by preventing her from advertising the fact that she is a CPA and a CFP—certified public accountant and certified financial planner, respectively—in addition to being a lawyer.

Ibanez was calm, confident, direct in a quiet, accommodating way, and able to demolish the state's byzantine, sometimes

Cont'd.

contradictory rules about professional advertising. Ibanez does not perform accounting services in her legal practice, but contends that she ought to be able to let potential clients know about her professional background through advertising.

When Justice John Paul Stevens asked if a CPA could advertise that he or she is a lawyer, Ibanez answered yes, adding dryly, "When the shoe is on the other foot, it's all right."

And she kept returning to the central point: "The record is void of anyone being misled."

Some justices seemed troubled about the CFP certification, because it is not as widely familiar as the CPA designation and because the certification for CFPs is not from the state.

Justice Harry Blackmun helped Ibanez out on that one, musing aloud, "I don't understand why the concern about meaning. *M.D.*—a lot of people don't know what that means. And a lot of lawyers use *E-S-Q*."

From the outset, Ibanez referred to herself as "the petitioner" and used "she" rather than "I." At first it seemed awkward, but after a while it seemed just right: formal, proper, the dignified thing to do.

"The board is punishing the petitioner for truthful speech," she said. "The speech was truthful, non-coercive, and relevant to the listener."

Most of the justices did not pick up on her usage, asking Ibanez directly what "you" did.

But Ruth Bader Ginsburg went along with her. Ginsburg began a question with, "Were you ever told . . ." Then she corrected herself: "Was petitioner ever told what she could do . . ."

Thomas, At Ease

It was a perceptibly more relaxed Clarence Thomas who spoke April 7 to faculty and students at the Ohio Northern University College of Law.

In past public appearances, Thomas has often been a brooding speaker who sounded burdened, proclaiming once too often that he was no longer bitter about his stormy confirmation hearings—thereby confirming that he still was bitter.

In his Ohio talk, captured by C-SPAN, Thomas made a few glancing references to his confirmation, but in a considerably lighter tone. His overall demeanor was more generous. He lavished compliments on Harry Blackmun, who had just announced his retirement, and he spoke more evenly, more modestly, about his tenure at the Supreme Court.

When asked what he would like to be remembered for, Thomas said, "Other than being the 106th justice, I don't have a clue." He also suggested "the only justice from Pinpoint, Ga."

Then, Thomas offered a telling story about his interview with President George Bush before being appointed to the Supreme Court. Bush asked him two questions, Thomas said.

"He asked, 'Can you make it through the confirmation process?' I cavalierly said yes," Thomas recalled, adding with a laugh, "That was a close one."

Bush's second question was, "Can you call them as you see them?" Thomas concluded, "I'd like to be remembered for keeping both promises."

Thomas still wears his confirmation ordeal as something of a badge of courage, it is clear, but this reference to it did not make the audience squirm.

In other answers to questions posed by the audience, Thomas made these comments:

- On what surprised him at the Court: "You can't really say as much as you'd like to say," noted Thomas, adding that when he was first appointed a judge, his brother had commented, "They finally figured out a way to shut you up."
- On Court isolation: "You can't just go out and be a socialite. On the Court of Appeals, we'd all go out and have a lunch." But at the Supreme Court, which was then on a two-week break from oral arguments, he said, "I will not see my colleagues until we sit again." Thomas added, "We do not lobby each other. You make your decisions in isolation. . . . It's a cloistered place."
- On notoriety: "One of the irritants is the loss of anonymity. I can't go anyplace." Last February, he said, he went to Hawaii with his wife and was recognized. "It was a big surprise and an unpleasant surprise."
- On Harry Blackmun: "On many issues he and I don't agree. But [his retirement] is to me a dear loss. He has been a friend, and it has been wonderful working with him. . . . I don't know anybody who can work the endless hours of Justice Blackmun."
- On making tough decisions on Court cases: "It tears at you." Thomas said that there are many times when a decision goes against what he wishes the result would be, but he feels that achieving that result is beyond the power of a judge. "It's like watching someone drown."

Brennan's Role

Retired Justice William Brennan Jr. gets something of a birthday present May 6, when the National Association of Criminal Defense Lawyers gives him a Champion of Justice Award.

The association's leaders will be in Washington for the group's annual "fly-in" and will present the award to Brennan at an evening reception. The award recognizes Brennan's "historic role in interpreting the Constitution and protecting individual liberties in the U.S."

Brennan turns 88 on April 25.

Marshall Nugget

The Court's dramatic ruling April 19 on gender discrimination in jury selection (*J.E.B. v. Alabama ex rel. T.B.*, No. 92-1239) recalls the Court's earlier landmark decision barring race bias in jury selection, *Batson v. Kentucky* (1986).

The Thurgood Marshall papers at the Library of Congress suggest that Marshall took an active role in the earlier case, in which the Court declared that the equal-protection clause governs the exercise of peremptory challenges by a prosecutor in a criminal trial.

After *Batson* had been argued, Marshall on March 24, 1986, took the unusual step of circulating to all other justices copies of a *Dallas Morning News* investigative report headlined, "Race Bias Pervades Jury Selection."

Steve McGonigle, co-author of the exposé—who now covers the high court for the paper—remembers Marshall's chambers asking for a copy of the stories, but he never knew what was done with them.

What impact the series had is unclear, but Marshall ultimately did not persuade the Court to go as far as he wanted it to. Marshall held out for elimination of peremptory challenges altogether, as a flawed device that could never be purged of racial bias.

Justice William Brennan Jr. tried to pull Marshall back, suggesting some moderating language in a concurrence that Marshall had circulated.

"I am not yet ready to decide that peremptory challenges must be eliminated in order to cure the discriminatory use of those challenges," Brennan wrote to Marshall, urging him to find other ways to guarantee that bias would not play a part in jury selection.

Marshall was unmoved. "I continue to believe that the majority's approach will by its nature be ineffective in ending racial discrimination," Marshall wrote to Brennan. "I see no reason to be gentle in pointing that out, and I doubt that pulling my punches would make the solution any better."

The Court handed down its ruling April 30—eight years ago this week. Chief Justice Warren Burger dissented, fearing the damage that would be done to peremptory challenges in general. In red pencil, Marshall wrote in the margins of his copy of Burger's dissent, "NO!!!"

Tony Mauro covers the Supreme Court and legal issues for USA Today *and the Gannett News Service. His column on the Court appears every other week in* Legal Times.

LEGAL TIMES

DATE: 4-25-94
PAGE: 23

TAKING ISSUE

BY STUART TAYLOR JR.

Arnold: Class of the Field

Richard Arnold's reputation for intellectual brilliance began making ripples when he was in kindergarten, at the three-room Patty Hill School in Texarkana, Ark.

"My younger brother Otis came to me with great awe," recalls Fred Graham, then a third-grader at Patty Hill (and now Court TV's chief anchor), "and said to me, 'Hey, you've got to know what's happening in kindergarten. We've got this kid who can count to 100 in Roman numerals.' "

The kid was Richard Arnold. He is now "undoubtedly among the most gifted members of the federal judiciary," known for "his eloquent and passionate defense of the fundamental rights which we all treasure" and for "warmth and generosity of spirit [that] have naturally made him enormously popular and beloved." So said retired Justice William Brennan Jr. (for whom Arnold clerked in the 1960-61 term), in one of a series of tributes by Arnold admirers in last November's *Minnesota Law Review*.

Arnold's judicial opinions do not display the clever, showy, epigrammatic brand of brilliance. They radiate unpretentious common sense and wisdom. They also exude rigorous intellectual honesty, careful scholarship, and reverence for law, leavened by years of experience in the trenches of electoral and legislative politics. And they reveal a moderate liberal spirit founded on reverence for the Bill of Rights and compassion for the downtrodden. He is the antithesis of an ideologue.

Both before and since becoming chief judge of the U.S. Court of Appeals for the 8th Circuit in 1992, the 58-year-old Arnold has vigorously protected the free-speech rights of people ranging from a gay-students association at the University of Arkansas to a white-supremacist group, from abortion clinics to an iconoclastic student newspaper at the University of Minnesota and *Newsweek*.

He has also written a much-admired decision requiring Arkansas to draw more black-majority legislative districts to remedy a long history of dilution of black voting power; has used the law creatively to vindicate the rights of women and black people to educational equality and freedom from harassment; has excoriated overzealous government anti-drug warriors for trampling the civil liberties of innocent citizens; has protected an evangelical church's right to hold prayer services whenever it wanted; has argued for a mother's right to select a surname of her own choosing for her child as an aspect of "the fundamental right of privacy"; and much more.

President Bill Clinton's rumored short list of Supreme Court prospects includes several admirable candidates. But it is no disparagement to the others to say (as many have said already) that Richard Arnold is the class of the field. (Arnold reportedly has a health problem; friends say it has no bearing on his ability to serve.)

Amalya Kearse and Stephen Breyer, both federal appellate judges (of the 2nd and 1st Circuits, respectively) may be in Arnold's league in terms of intellectual horsepower—but neither has his reputation for warm, unpretentious humanity and gentle persuasiveness.

Solicitor General Drew Days III and U.S. District Judge José Cabranes are both very smart, dedicated, public-spirited, immensely likable men—but neither has had to put his principles on the line by crafting appellate opinions on anything like the succession of divisive public issues that Arnold has faced. Nor has either shown himself to be the intellectual equal of Arnold. A modest man with little to be modest about, Arnold has quietly dazzled his fellow judges as well as the kindergartners in Texarkana and his classmates at Yale College (from which he graduated first in his class) and Harvard Law School (ditto).

Interior Secretary Bruce Babbitt is the best kind of politician, but without much of a track record thinking through Supreme Court issues. And if the president wants someone with the kind of political skills that might help win over wavering colleagues and forge consensus on the high court, he could do no better than Richard Arnold. A leader in the federal judiciary, he is held in high esteem by colleagues from coast to coast. Before becoming a judge, Arnold worked in political campaigns, ran for Congress (unsuccessfully), and learned the ropes both in the Arkansas legislature and in Congress as a top aide to Gov. and (after 1974) Sen. Dale Bumpers.

Many federal appellate judges have lived relatively cloistered lives. Richard Arnold has had a rich diversity of experiences: After clerking for Brennan, he spent three years practicing antitrust law at D.C.'s Covington & Burling. Then he returned to his family's law firm in Texarkana, where he was an all-around, small-town lawyer, defending corporations, representing civil-rights plaintiffs, and logging more trial experience than any current Supreme Court justice. He served as a U.S. district judge from 1978 to 1980 before President Jimmy Carter elevated him (at Bumpers' request) to the 8th Circuit.

All well and good, some say, but Arnold has this terrible problem: He's a friend of President Clinton's who has lived for years in—horror of horrors—Little Rock! Cronyism! Banish him!

cont'd

It is a sad commentary on the superficiality of political discourse in the television age to hear people—including me, in some sound bites I'd like to rephrase—downplaying Arnold's Supreme Court prospects for reasons such as this. It's not that we journalists just concocted the "Little Rock problem"; well-connected Democrats tell us it's potentially crippling—not because Arnold has anything to do with any of the activities grouped under the "Whitewater" rubric, but simply because of geographical guilt by association.

Isn't this ridiculous? Imagine a press conference at which, after the president has proudly announced Richard Arnold's nomination, a reporter whiningly asks, "Mr. President, aren't you concerned that it might create an appearance of cronyism to choose a friend of yours from Little Rock?" If Bill Clinton can't knock that one out of the park, he's not half the persuader I think he is.

(A friend of Arnold's recently groused to him about Washington's obsession with his "Little Rock problem." Arnold's wry response was: "You know, it's just much too late to move.")

It is almost as dispiriting to hear some people write off Arnold as suspect because he has been praised by conservatives like Sen. Orrin Hatch (R-Utah) and columnist William Buckley Jr. But if Arnold is a closet conservative, he must be a clever one indeed to have fooled such estimable liberals as retired Judge A Leon Higginbotham Jr. of the 3rd Circuit, Judge Patricia Wald of the D.C. Circuit, and Justice Brennan.

Higginbotham called Arnold "one of the firmest supporters of civil liberties generally and equal rights specifically of any judge on the bench," in one of the tributes last November, which Higginbotham co-authored with John Frank of Phoenix, long a leading liberal lawyer and Supreme Court expert. And Wald's tribute praised Arnold's courage, compassion, and "persistent, ornery refusal to rely on hyper-technicalities to dismiss individual rights claims with uncomfortable consequences."

That's not to say that Arnold is a crusading liberal activist in the mold of Brennan. He is more restrained, both by a consciousness of the limits of the judicial power and by a pragmatic sensitivity to competing concerns. Apart, perhaps, from his fervent devotion to First Amendment rights, and to simple fairness to individuals, Arnold is not a crusader for causes. Friends say he models his judicial method on the rigorously principled liberalism of the late Justice Hugo Black.

It would be nice, in some ways, to have a new Brennan to keep a bold, liberal, activist vision of law alive at the Court, if only in dissent. But justice (and even the liberal political agenda) might be better served in the coming years by the kind of principled, moderate-liberal consensus-building that Arnold can provide. In any event, none of the other candidates on the Clinton short list would be much (if any) more liberal than Arnold. That's no accident: The president does not want to deplete his political capital on the kind of confirmation battle royal that would follow nomination of an unalloyed liberal activist.

No perfect candidate exists. One Arnold opinion in particular has drawn understandable criticism from women's groups: Eleven years ago, he upheld the Jaycees' claims that their First Amendment freedom of association gave them a right to exclude women from full membership. While Arnold expressed personal disapproval of such exclusionary practices, his legal analysis arguably gave too little weight to the serious obstacles posed by this form of sex discrimination to the professional advancement of working women.

But the First Amendment claims of the Jaycees seemed far more substantial at the time than the 7-0 Supreme Court vote reversing Arnold might suggest. And, as Judge Wald wrote last year, Arnold's decisions "have on the whole been distinctly sympathetic to women's claims of discrimination in the workplace and in school." (She also wrote that Arnold's abortion-rights opinions are "in most respects far more expansive than the present Supreme Court's.")

Particular issues aside, Richard Arnold's philosophy of judging, and of living, seems well summed up in a remark he made in an interview for the Higginbotham-Frank article:

"If you have made a serious effort to focus your own conscience on any subject and have reflected on it carefully, and you are doing what your conscience tells [you] you ought to be doing, then that is what God requires."

Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer *magazine. "Taking Issue" appears every other week in* Legal Times.

THE NATION'S NEWSPAPER
USA TODAY

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'Last gasp' scramble to clear up backlog

By Tony Mauro
USA TODAY

A large number of vacancies on the federal bench has some critics complaining. But the Clinton administration is defending its record on judicial nominations.

More than 10% of the 837 federal judgeships are vacant, at a time when Congress is on the verge of increasing the courts' workload with a crime bill that creates dozens of new federal crimes.

Jon Newman, chief judge of the federal appeals court in New York, recently criticized both the administration and the Senate, which confirms judicial nominees.

"The number of vacancies is unacceptably high," Newman said. "The duration of these vacancies is absolutely disgraceful."

But Assistant Attorney General Eleanor Dean Acheson says, "I absolutely, aggressively disagree" the pace of appointments has been too slow. "Critics have no clue as to the process and how incredibly important it is to be deliberate."

Acheson notes that President Clinton has appointed 100 judges since taking office, compared with 70 at this point in the Bush administration and 68 in the first Reagan administration. Bush left office with 113 vacancies pending.

Between the Justice Department and the White House, Acheson says, 20 staffers are working on judicial nominations to clear up backlogs.

Acheson says a "last gasp" effort is under way to announce more nominees in coming weeks so they can be confirmed by the end of this session of Congress.

Both last year and this year, resources of both the administration and the Senate were diverted by Supreme Court appointments — which get far more scrutiny than lower court nominations.

The administration is winning praise for the diversity of its appointees.

Nearly one-third of Clinton's appointees are women, and 38% are members of a minority group, according to the Alliance for Justice.

In March, Clinton named only the second Native American in history to the federal bench — Michael Burrage of Oklahoma, a member of the Choctaw Nation. He was confirmed for a district court seat by the Senate on June 8.

"The administration is working hard to take advantage of a golden opportunity to change the face of the judiciary," says alliance executive director Nan Aron.

"People used to say there was a tension between excellence and diversity," Acheson says. "We haven't found that at all. Across the board, we have had some excellent candidates to work with."

THE NATION'S NEWSPAPER
USA TODAY

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COVER STORY

Thomas: The high court's contrarian

Justice says 'the dirty little secret of freedom is that you are on your own'

By Tony Mauro
USA TODAY

Show Supreme Court Justice Clarence Thomas the expected path, and he'll walk the other way.

Tell him justices should steer clear of controversial figures, and Thomas will host conservative talk show host Rush Limbaugh's wedding, as he did last month.

Tell him he'd be wise to cozy up to the media establishment, and Thomas will state, as he did to a book author recently, that *The Washington Post* and *The New York Times* "can say absolutely anything they want about me. I will never read them again to see it."

Tell him to take up the late Thurgood Marshall's liberal mantle, and he'll speak out against prisoners' rights, as he did in a ruling just three weeks ago. Brutality in prisons, he shrugged, is inevitable: "Prisons are necessarily dangerous places."

It has been nearly three years since Thomas, 46, burst onto the national scene with confirmation hearings that featured sensational sexual harassment charges by former employee Anita Hill.

Since then, Thomas has stayed largely out of the public eye. He almost never speaks from the bench. He sometimes goes weeks without seeing another justice. And, after work he almost always retreats to his suburban home with his wife and best friend, Virginia Lamp Thomas.

But in rare public sightings — often before conservative groups that supported him — Thomas has charted a distinctive course, like no other justice in recent memory.

Some say his solitary journey is a thumb-in-your-eye campaign to avenge the confirmation ordeal he faced at age 43. That theory is fueled by a comment he has made more than once: "The next 43 years will be my answer to what happened."

The Rev. Jesse Jackson criticized Thomas' hosting of Limbaugh's wedding as "a contemptuous, in-your-face political act, quite improper in the political sense."

Jackson also said Thomas' rulings have been "quite blatant in their contempt for our progress, even though he's been a prime beneficiary of the civil rights struggle."

But others see Thomas' path in less confrontational terms. He is a private man, friends say, who was overwhelmed by sudden notoriety, and still is regaining his composure.

Hosting and presiding at Limbaugh's wedding, they say, is a symbol of Thomas' loyalty, not his politics. Limbaugh supported him early and often in the face of Hill's charges, and they became close.

"With Justice Thomas, friendships are unconditional," says longtime friend Armstrong Williams, publisher of *The Right Side* newsletter and a radio talk-show host. "You tell him you need him and he'll be there."

But more than loyalty is at work in Thomas' approach to life and work.

In many of his public talks, Thomas conveys a view of the world borrowed from the Catholic seminaries he attended for four years: Life is a test, a burden, full of obligations and trials that must be dealt with alone.

"The dirty little secret of freedom is that you are on your own," he told an Ohio university audience in April. "It certainly is more attractive to expect nothing from a person and never hold him accountable. But nature is far more exacting than that."

He also tells of his grandfather's admonition: "If you make your bed hard, you lay in it hard." Thomas says he never quite understood what that meant literally, but the message was clear: Don't blame anyone else for the messes you find yourself in.

That doesn't mean Thomas holds himself responsible for the Anita Hill debacle. He still views that as the modern equivalent of a lynching.

But it does mean that in putting the Hill episode behind him, Thomas seeks neither forgiveness nor approval from Washington's elite.

"When we demand something from our oppressors — more lenient standards of conduct, for example — are we going from a state of slavery to a more deceptive, but equally destructive state of dependency?" Thomas told a Federalist Society audience last month.

"Learning the lessons that we must learn cannot forever be avoided by sweeping our difficulties under the rug of societal blame," Thomas said at Mercer University last year.

In that world view, minorities deserve no special favors, and no one — not pregnant women, not death row inmates — deserves a whit more protection from the Constitution than it explicitly gives.

Only once has Thomas expressed regret that, in his view, the Constitution sharply limits his ability as a judge to right the wrongs of society.

In the Ohio speech in April, he said his votes often run counter to his own sympathies. "It tears at you. It's like watching someone drown."

That regret comes as a surprise to some court-watchers, who cite the unsympathetic tone in his opinions.

Two years ago, Thomas declared in a dissent that when guards beat a prisoner, they are not violating the constitutional ban on "cruel and unusual punishment" because "judges or juries — but not jailers — impose 'punishment.'"

That dissent and others earned Thomas widespread criticism. *Emerge* magazine depicted him as a "handkerchief head" — a derisive term to describe subservient blacks.

None of that has silenced Thomas: Earlier this month, he went out of his way in another prison case to repeat his views on punishment.

Thomas votes almost all the time with conservative Justice Antonin Scalia — a higher affinity than any two other justices, a Howard University Law Review study found.

But it still is difficult to gauge his views on some major legal issues. The opinions Thomas has been assigned to write, mainly by the chief justice, have usually been technical, exploring the far corners of bankruptcy, commercial law or the like.

That could change this week.

Before the court adjourns for the summer, it is expected to hand down a half-dozen or more decisions with headline-making potential, and Thomas could author some.

And Clarence Thomas may be loosening up. He is just now beginning to laugh at himself in public, joking about his efforts to keep his weight down, and telling audiences what his brother told him when he first became a judge: "They finally figured out a way to shut you up."

Within the marble walls of the court, Thomas is friendly and accessible to court employees, especially his law clerks.

In fact, Thomas already has started an annual tradition — and a contrary one at that.

When the clerks of other justices hold yearly reunions, some are fairly formal, even black-tie affairs.

When Thomas' current clerks get together in September, it is expected to take the same form as last year's: a cookout in Thomas' backyard.

CLINTON & QUOTAS

He talks 'New Democrat,' but his appointments are by race

UPFRONT & CENTER

BEN WATTENBERG

SOME straws in the wind came floating into the legal community on April 26 regarding the most important new law of our era.

By a vote of 8-1, the Supreme Court ruled against retroactively applying the Civil Rights Act of 1991. This means that the law will throw out thousands of cases that had already been filed prior to the passage of the highly controversial and ambiguous act, originally described by George Bush as "a quota law."

The one dissenting justice was Harry Blackmun, who has shown a strong tendency to decide matters on the basis of what he wishes the law was, rather than what the law says, or seems to say. No surprise there.

Of far greater interest was the fact that the Clinton administration's position, expressed to the court by Solicitor General Drew S. Days 3d, reversed the position on the matter previously taken by the Bush administration.

Now, the ruling about retroactivity is a complex one and has antecedents that concern more than just the 1991 act. However, the Clintonite position takes us one more big step toward answering the question, "How do you stand on quotas?"

The central rulings on the 1991 law are yet to come, and revolve around the question of how the phrase "disparate impact" will be interpreted. Roughly, the "proportionalists" maintain that if the numbers of blacks, Latinos, women and other protected groups don't generally match the population involved in jobs or education, then discrimination is in the air.

The other side of the argument, pushed by "meritocrats," says that accomplishment — not race, gender or ethnicity — is what should count in jobs or education. Otherwise, they say, it's "reverse discrimination."

Clinton campaigned against quotas, and for merit. That was one of the ways he informed the voters that he was a "New Democrat."

But he has not governed that way. His political appointments have been doled out quota-style: a black for this job, a Latino for that one, a "skirt" here. He has supported gerrymandered black congressional districts; Clinton's health plan calls for quota advancement for minority doctors seeking specialty training. (Won't that give you confidence when you've got a serious medical problem?) The crime bill may founder because liberals, with no opposition from Team Clinton, are demanding that the death penalty be doled out according to racial proportion, or not at all.

The relevant appointments at the Department of Justice, and elsewhere, are almost without exception from the Proportional Team.

Clinton's policy is wrong and politically dangerous.

Proportionalism sets race against race. It implies that various groups are inferior and can't make it on their own. It discredits the achievements of the legitimately successful.

The political danger is that quotas are a national firestorm waiting to happen. So far, Clinton has been helped in moving his New Democrat agenda by an angry public. The forthcoming crime bill is tilting toward the tough side, where it belongs.

A similar situation seems to be developing on the welfare front. Clinton's task force on welfare is on the soft side, but the public and Congress aren't, and we may end up with legislation on the tougher side, labeled "Clinton's Welfare Bill."

But the issue of race and proportionalism is a brick wall in the Democratic Party. It is doctrine, not just policy. It will be far tougher to get a publicly driven compromise on quotas than on welfare or crime.

So far, despite all the talk over the years about Republicans playing "the race card," it has never been seriously tried in a national campaign. Yet, in California, voters are signing petitions for a "California Civil Rights Initiative," an anti-reverse-discrimination measure that will likely be on the ballot at the time of the California presidential primary, scheduled for early in the 1996 election year. Current polls show that about 70 percent to 80 percent of Americans, including most blacks, oppose reverse discrimination.

Clinton has shown an uncanny ability to be on several sides of the same issue. On this one, if he acts indecisively in a pro-quota manner, it may not work. He may split his party decisively.

Ben Wattenberg is a senior fellow at the American Enterprise Institute.

THE PRESIDENT
Looming firestorm.

PHOTOCOPY PRESERVATION

ve fest spins out of control.

Filling In Justice's Civil Rights Staff

■ At the Justice Department, civil rights chief **Deval Patrick** has been putting together his senior staff. The lineup sent over to the White House so far has **Isabelle Katz Pinzler**, now with the American Civil Liberties Union in New York, and **Kerry Scanlon**, now at the NAACP Legal Defense and Educational Fund Inc. here, in the deputy slots for litigation in housing, employment and other areas.

Stuart J. Ishimaru, late of the U.S. Commission on Civil Rights, and **Juanita Hernandez**, most recently a special assistant in the office of the Texas attorney general, will be counsels to Patrick for policy and legislation.

A third deputy was to have been **Sherrilyn Ifill**, formerly at the LDF in New York and more recently teaching law at the University of Maryland School of Law in Baltimore, but she turned down the job. It's not clear that slot will be filled right away.

Meanwhile, a new career deputy needs to be picked to replace longtime deputy **James P. Turner**, who is retiring.

Cutler's Cinderella Deadline

ing of short-timers: White House counsel

PHOTOCOPY
PRESERVATION

Tap Dance on Potable Water

By Al Kamen
Washington Post Staff Writer

Even though it's like shooting the proverbial fish in the barrel, the Sierra Club is picking on poor Congress, calling lawmakers hypocritical when it comes to practicing and preaching on the issue of safe drinking water.

Seems the enviros did a survey and found that 91 percent of House members and 86 percent of the senators buy bottled water for their offices, most at taxpayer expense.

Of course, one reason the Senate's percentage could be so high is because the water system in the Dirksen Senate Office Building is under repair due to high lead content. (Could that explain a lot of things that go on there?) The drinking fountains have yellow tags stating: "System Under Repair. Do Not Use."

Almost half of the Americans who buy the bottled variety (spending nearly $3 billion in 1992, according to the American Water Well Association) say they do so because they are worried about health problems associated with tap water, according to the survey.

"One would think that with an overwhelming percentage of the Senate purchasing bottled water and significant concern regarding drinking water safety apparent across the nation, the Senate would be poised to strengthen the Safe Drinking Water Act," the club argues.

But the Sierra Club survey counted 47 senators who drink bottled water in favor of legislation that the organization argues would "cripple" the federal law. Fully 206 House members "who purchase bottled water for their own or office use" are also on board to weaken the law, the Sierra Club says.

We're shocked, shocked.

Biden vs. Wirth: Win, Lose or Draw

■ Speaking of the esteemed Senate, Sen. **Joseph R. Biden Jr.** (D-Del.) took off after a former colleague in a recent interview with Gannett News Service. Lamenting the lack of "institutional loyalty" among his colleagues, Biden recounted a conversation that took place in 1992 with a fellow senator who had decided not to run again and did "a big takeout piece in the New York Times" about "the Senate is for sale."

"And we [senators] were at lunch," Biden said, "[and] I looked at the guy and said, 'Gee, I thought the reason you were not running is you were going to lose. I saw the polling numbers, you phony son-of-a-bitch.'"

The former colleague, not mentioned by Biden by name, turns out to have been former Colorado senator and now undersecretary of state **Timothy E. Wirth**. "I have no fight with Joe Biden," Wirth said last night. "There were a number of people who were upset by the article," he said. Wirth said, however, "there were no polling numbers" when he decided not to seek reelection. "I expected to win by my usual landslide," he joked.

2 Named to EEOC; Chair Still Unfilled

■ **President Clinton** yesterday said he would nominate **Paul M. Igasaki**, executive director of the Asian Law Caucus, and **Paul Steven Miller**, deputy director of the office of consumer affairs at the Department of Health and Human Services, to seats on the Equal Employment Opportunity Commission.

Assuming either or both are confirmed soon, the move should ensure that the five-member commission has a quorum when acting Chairman **Tony E. Gallegos**'s term expires July 1.

Still left open, among other posts, is the job of chairman, which the administration has said it would very much like to give to a Hispanic, preferably a Puerto Rican, largely because Hispanics have not landed any of the key civil rights jobs so far. Potential candidates, however, so far have floated up and then have backed out or been shot down.

Some civil rights activists think that if Clinton selects a Hispanic for the Supreme Court, such as federal Judge **Jose Cabranes** or perhaps New Mexico Supreme Court Justice **Joseph Baca**, there will be less concern in the White House about a Hispanic chairman for the EEOC, leaving the field wide open. This trade-off, however, has never been discussed in the White House, a source there said.

Turf Battle Over, Bromwich Back on Track for IG

■ At the Justice Department, the nomination of Washington attorney **Michael Bromwich** to be inspector general is back on track. Bromwich's move had been stalled by a turf battle over whether the IG's office (which looks out for waste, fraud and abuse) should be expanded to include the Office of Professional Responsibility (which oversees the department's prosecutors) and is supposed to guard against prosecutorial misconduct.

Sen. **John Glenn** (D-Ohio), godfather of the IGs, along with former deputy attorney general **Phil Heymann**, favored the merger. Sen. **Orrin G. Hatch** (R-Utah) favored keeping the functions separate.

Bromwich's nomination got caught in the middle. Justice shelved the merger proposal. "Now Glenn will be unhappy," one department official said, then explained: "We could not afford to alienate Hatch [a key player on the Senate Judiciary Committee], certainly not now."

Justice sources say Bromwich, a former federal prosecutor and top aide to Iran-contra independent counsel **Lawrence E. Walsh**, had been lured by the prospect of the more powerful combined office. He has agreed to take the regular IG job.

But another prospective nominee for a key job at the department is said to have been derailed. **Mark Soler**, executive director of the Youth Law Center in San Francisco, had been penciled in to be administrator of the office of juvenile justice and delinquency prevention.

Seems Soler was critical of a proposal on kids and guns championed by Sen. **Herb Kohl** (D-Wis.), chairman of the Judiciary subcommittee on juveniles.

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WASHINGTON

U.S. ready to contain Cuban refugee threat

The Clinton administration is moving quickly to defuse the latest Cuban refugee scare and dispel fears that another Mariel-style mass exodus from the communist-ruled island might be unleashed on southern Florida.

The White House said Monday it rejects Cuban leader Fidel Castro's statement the United States encourages Cubans to leave their country illegally. It said it will not let him "dictate" U.S. policy.

AP

CASTRO: May allow mass exodus

White House press secretary Dee Dee Myers, commenting on threats by Castro to permit a mass exodus of refugees from Cuba to the USA, said the United States has drafted a strategy to deal with a surge in boat people but has seen no significant increase.

"Obviously we're keeping a close eye on it and making contingency plans to deal with any eventuality," Myers said. But it may be moot because the anxiety about a boatlift on Friday had faded by Monday. "It seems quiet at this point," Myers said.

In Miami, Cuban exile leader Jorge Mas Canosa, chairman of the influential Cuban-American National Foundation, says the Cuban problem "is not going to be solved by Cubans leaving the island and coming to the United States. The problem is going to be solved by exiling just one man ... and that man is (President) Fidel Castro."

Meanwhile, the U.S. Coast Guard in Miami said its ships picked up 230 Cuban refugees in the seas between Cuba and Florida over the weekend: 61 Cubans Friday, 115 Saturday and 54 Sunday. The people on makeshift boats and rafts left Cuba amid reports of unrest after three ferryboats were hijacked in nine days by Cubans hoping to reach the USA.

HEFLIN FINE: Sen. Howell Heflin, D-Ala., was released from a Birmingham, Ala., hospital after a pacemaker was implanted in his chest. Heflin, 73, left in "very good shape," says University Hospital spokesman Hank Black. He was hospitalized last week after complaining of chest pains.

PEYOTE OK: The House approved a bill protecting the religious use of the hallucinogen peyote by Native American tribes. While federal regulations have protected such use, the Supreme Court ruled in 1990 that the Constitution's religious freedom provisions do not provide that protection and that specific legislation was needed. A similar bill is pending in the Senate.

CUSTOMS EMPOWERED: Customs agents will be given more authority to conduct international drug-smuggling investigations, under an agreement announced by Attorney General Janet Reno and Treasury Secretary Lloyd Bentsen. Customs agents doing drug work will no longer have to get authorizations for each investigation.

LOGGING BANNED: The House approved a measure that would permanently ban logging on 22,000 acres of forest preserve at Oregon's Opal Creek. The Clinton administration opposed earlier versions of the bill, but now supports it. It has not yet been introduced in the Senate.

Written by Erin Einhorn. Contributing: Juan Walte.

ELSEWHERE IN THE WORLD

By Yousef Allan, AP

IN AQABA, JORDAN: Israel's Yitzhak Rabin, left, and Jordan's King Hussein after opening a border crossing.

Border crossing bolsters Israeli-Jordan peace pact

Israeli and Jordanian leaders have cemented their commitment to peace with the opening of a new border crossing and a cruise in the Gulf of Aqaba.

Negotiators from both countries follow up Monday's ceremonies with talks today on water rights, economic cooperation and border demarcation.

Israeli Prime Minister Yitzhak Rabin took his first public steps on Jordanian soil and Jordan's King Hussein entered Israeli territorial waters during a cruise with Rabin.

The ceremonies on land and at sea cemented the declaration just two weeks ago by the two leaders that they were ending the 46-year state of war between the two neighbors.

The new border crossing is near Jordan's port of Aqaba and its Israeli neighbor Eilat.

Secretary of State Warren Christopher, guest of honor at the border ceremony, ended a Mideast peace mission with a meeting with Rabin in Jerusalem. He said his talks with Israeli and Syrian leaders produced "good progress" but did not elaborate. Israeli-Syrian negotiations are stalemated over the Golan Heights, captured by Israel in 1967.

KOREAN TALKS: U.S. and North Korean diplomats reported slight progress in talks about opening North Korea's nuclear program to inspections. "There is still a long way to go," said U.S. negotiator Robert Gallucci. In exchange for inspections, North Korea is asking for diplomatic ties to Washington and a modern light-water reactor to replace its aging graphite-moderated reactor. It also will need help for its isolated, deteriorating economy.

BOSNIA WAR: Ethnic Serbs in Bosnia-Herzegovina feel vulnerable for the first time after being cut off by old patron Yugoslavia, a move that could cripple their mechanized army within months, said Lt. Gen. Michael Rose, the United Nations' top peacekeeper in Bosnia. Serbian-led Yugoslavia closed its borders with Serb-held Bosnia last week to stave off sanctions by the United Nations as punishment for the Bosnian Serbs' refusal to accept a new peace plan to end the civil war in the former Yugoslav republic.

ALSO: A dam burst following heavy rains in central Russia's Ural Mountains, washing away 140 houses and killing at least 10 people.... The IRA shot dead a part-time British soldier in his butcher shop near Belfast, a day after Protestant extremists killed a pregnant Catholic woman.

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THE WALL STREET JOURNAL TUESDAY, AUGUST 9, 1994

Labor Letter

A Special News Report on People And Their Jobs in Offices, Fields and Factories

VERBAL ABUSE, from swearing to shouting, grows as a workplace problem.

An American Management Association survey of 500 companies shows that more than 60% of reported incidents of workplace violence involve threats or harassment. The Justice Department has added questions on verbal abuse in the workplace to its annual National Crime Victimization Survey. It plans to release the data on verbal violence this fall.

Anthony Baron, chairman of the Scripps Center for Quality Management in San Diego, says that verbal abuse is "like putting a bomb in a workplace; you're picking up the pieces afterward," because morale and productivity can suffer. He says that more complaints are coming from workers in small businesses and government agencies. The U.S. Postal Service and the Army have recently used consultants to advise personnel on ways to deal with verbal abuse.

"The workplace has never been more stressful" with "increases in every kind of unpleasantness," says the management association's Eric Greenberg.

A GRASS-ROOTS EFFORT: Silicon Valley Landscapers try to organize.

About 15 gardeners pushing lawn mowers led a march of 600 mostly Latino workers Friday through downtown San Jose, Calif. It was part of an effort by the Service Employees International Union, which ran the controversial Justice for Janitors campaign to organize cleaning personnel, to represent the area's estimated 2,000 landscape workers.

The first goal is to put pressure on Sony, which subcontracts from a landscape firm that uses nonunion workers. Organizers plan to target Intel, the computer-chip maker, for the same reason. One gardener complaint: pesticide spills. Miguel Hernandez, a gardener who is involved in the campaign, says workers also don't have ready access to bathrooms. Options: gas stations or bushes.

BEAN COUNTERS: Surging prices raise cost of office coffee.

Quill Corp., a huge office-supply firm that sells coffee, estimates frost damage to Brazil's coffee crop will cost U.S. firms as much as $112 million more for office coffee drinking, which accounts for 20% of U.S. coffee consumption. This summer Quill has raised nongourmet coffee prices 50%, and gourmet prices 15%, and more increases are expected.

Margie Hughes, a senior lab technician at DuPont Co. in Wilmington, Del., boosted monthly dues for her coffee club to $5 from $3. The two-pound Maxwell House coffee she buys almost doubled to $7.89 from $3.99. Ms. Hughes left the receipt by the pot to prove to her coffee-club naysayers she wasn't gouging: "It just kills me."

The reporters in the Treasury Department pressroom won't raise prices; their coffee fund has a $200 surplus to absorb higher costs.

PRESIDENT AND MRS. CLINTON have featured Safeway in their health-care lobbying. A few months ago, the first lady went to a Safeway store and heralded the company's employer-paid health plan. Now, union workers in Washington-area grocery stores wear buttons saying: "Tell Congress that you want what I've got." One hopeful target: cart-pushing U.S. lawmakers.

PANTYHOSE RUNS plague women but there's a male equivalent: ripped pockets. When men sit quickly in a chair, their pant pockets sometimes catch on the armrests and tear. It happens even with new, sleeker chairs. The repair cost can run $30. It has hit Scott McLucas at New River Media, a Washington production company, several times. "It's the working man's burden," he says.

SHAVING CREAM, LINE ONE. Pranksters at the Pacific Stock Exchange last week put shaving cream on the hearing end of telephone receivers and told co-workers a call was waiting. Victims ended up with an ear full of shaving cream. "We got a guy twice in one day," one trader chortles.

SURROGATE SHRINKS: Search firms provide more and more counseling advice.

Search firms and placement consultants spew out all sorts of tips to workers and bosses; some hire public-relations firms to tout their counseling expertise. Psychologist Craig Dreilinger, who heads Dreiford Group, a Bethesda, Md., consultant to companies that are cutting employees, warns against "employee co-dependency" created by generous benefit programs. Drake Beam Morin, a New York outplacement firm, advises job seekers on how to negotiate pay and benefits, as well as how to win nonsalary perks such as office art, travel luggage and an office view.

Innis Co., a Dallas career-consulting firm, advises executives to pack a resume "along with suntan lotion in your summer vacation suitcase" in case they find a possible job opportunity at the beach. Battalia Winston International, a New York executive search firm, suggests packing an extra shirt in a briefcase before interviews on hot days. Dale Winston, Battalia president, says they are filling a gap brought by "diminishing mentors" within corporations.

Another Battalia tip: Job seekers who color their hair should "have it done professionally, so no one knows for sure."

THE CHECKOFF: Sen. Metzenbaum of Ohio steps into the baseball war, by issuing a statement that he is "working on a baseball strike solution." . . . Potomac Nannies in Bethesda, Md., coins a term for nannies who want a lot of perks: "I-want nannies."

—ASRA Q. NOMANI

Skewed Marketing

Some Mortgage Firms Neglect Black Areas More Than Banks Do

Check of Applications Shows Many Lenders Focusing Efforts on the Suburbs

Higher Cost Is Often Blamed

By RALPH T. KING JR.
Staff Reporter of THE WALL STREET JOURNAL

CHICAGO—PNC Mortgage is one of the country's top five home lenders, and here, on its home turf, it is a fierce competitor. But not in the view of Larry Powell, an African-American who owns ERA Preferred Realty, a real-estate brokerage firm on the largely black South Side. "PNC?" he says. "Never heard of 'em."

A reliable flow of home loans is the lifeblood of Mr. Powell's trade. But only smaller lenders, which tend to have higher interest rates, more limited products and less staying power, knock on his door. PNC Mortgage Corp. of America, a unit of Pittsburgh-based PNC Bank Corp., and many other major mortgage bankers "are not trying to pursue business in this area," he says.

Nor in many other predominantly black communities across the country. While commercial banks and thrift institutions have often been accused of redlining, an analysis of Federal Reserve Board and Census Bureau data by this newspaper shows that the biggest group of home lenders — the fast-growing mortgage bankers, which don't take deposits as banks and thrifts do—includes many of the institutions that have most assiduously avoided black areas.

Early Evidence

Few people now deny that mortgage discrimination exists. For three years, the federal government has gathered evidence: Black loan applicants are rejected twice as often as are whites. Other minorities, most notably Asians, fare better but also face unequal results. Yet such evidence has drawbacks because it doesn't take into account the applicants' credit and income histories.

Another way to shed light on the issue is with this test: Does a lender bring in proportionately as many loan applications — whether or not the applications result in loans — from heavily black communities within its market area as it does overall? If so, its marketing efforts are vigorous everywhere. If not, it is in effect cherry-picking business from whites while avoiding black areas.

While loan-rejection results can be manipulated and explained away, it is hard to do so with the results of marketing outreach. An applications-share test is "the smoking gun" of redlining, says the Rev. Charles Stith, a Boston-based advocate of fair lending.

Mortgage lenders say the test unfairly implies discrimination when they are merely following economic dictates. Inner-city loans often involve depressed, volatile and thus risky areas—the areas that many large retailing and supermarket chains are similarly wary of entering. Such loans also are generally small and require extra analysis, such as verifying data on co-borrowers, that drives up costs.

Chasing Big Loans

"You can barely make any money on smaller loans," says Terrance Hodel, president of North American Mortgage Co., which scored relatively poorly on the market-share test. "This is a low-margin, high-volume business, and the way to make it pay is to get bigger loans. That's the main reason we are not involved in these areas. It has nothing to do with race."

Nonetheless, the share-of-applications test seems to gauge accurately the effort to reach inner-city blacks. For this article, an overall share for each lender was derived from the number of home-purchase applications it received in all states where it operated in 1992 (the latest year for which figures are available). Looked at next was its share of loan applications from residents of census tracts that are 75% or more black in those states. Nearly all the 100 largest lenders, including banks and thrifts, operate in more than one state.

Conclusion: Of the nation's top 100 mortgage lenders in terms of applications, 63 had less penetration in largely black areas than they did overall and, in most cases, significantly less. Mortgage bankers, which account for 75 of the top 100, make up 50 of those 63 deficient lenders, or 79%. The other lenders — banks and thrift institutions, two groups subject to fair-lending regulations—had a comparatively good record, suggesting that they have been unfairly accused of discrimination. But many mortgage bankers doing little inner-city lending are banks' and thrifts' unregulated subsidiaries.

Some Poor Performers

Some big mortgage bankers were among the worst performers by this gauge. Directors Mortgage Loan Corp., for example, got two applications of every 100 received by all lenders in its overall market, but only 0.3 application for every 100 from the largely black areas within its market. Thus, the ratio of its penetration of black areas to its penetration of all areas is a very low 0.15. Other poor performers by this gauge included Countrywide Funding with a 0.3 share ratio, Prudential Home Mortgage at 0.44, PNC Mortgage at 0.45 and Norwest Mortgage at 0.59.

Yet 34 big lenders showed up relatively well, with share ratios above 1.0, indicat-

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Some Mortgage Firms Neglect Predominantly Black Communities

Continued From First Page

ing that their share of applications from black areas was greater than their share of the applications from all areas where they do business. These lenders include plenty of mortgage bankers, and giants at that, such as Margaretten & Co. and the NationsBanc Mortgage Corp. subsidiary of NationsBank Corp. of Charlotte, N.C. The size of this group may be surprising, given the perception of endemic lending bias.

The mortgage bankers with weak outreach in predominantly black areas all say they are trying to fix the problem. If they don't, they may be forced to. Congress has proposed ending their exemption from fair-lending rules, and their nonexempt rivals are clamoring for that. New rules proposed by regulators seek to impose some requirement to lend in minority areas.

In addition, the federal government subsidizes inner-city lenders, but its decades-old programs have been plagued by abuses, have accumulated massive losses over the years and, ironically, sometimes undermine the very communities they are designed to help.

Mortgage bankers, although around for decades, mushroomed during the S&L debacle and the recent refinancing boom and last year made more than half of all home loans. Yet they are barely visible; they get most of their business through intermediaries such as real-estate brokers.

Mortgage bankers often don't penetrate black neighborhoods as well as commercial banks and thrifts do because their operations rely more heavily on a high volume of cookie-cutter loans, ones that are a snap to approve, and these are more plentiful in mostly white suburbs than in mostly black inner cities. In addition, mortgage bankers need higher volumes because they lack the cheap source of funds available to banks and thrifts—deposits. In fact, they borrow from banks.

Although serving black neighborhoods poorly may have little to do with racism, it carries a high social cost. Areas that are more than 75% black are home to 10.6 million blacks, or 35.5% of the nearly 30 million African-Americans. Partly because of restricted access to capital, just 7.7% of all homeowners are black even though blacks constitute 12.1% of the U.S. population. Because home ownership fosters a commitment to community, a sense of belonging to society, it is likely that blacks' difficulties in buying homes increase the alienation some feel.

FEW LOAN APPLICANTS

African-Americans, and especially those living in largely black communities, are underrepresented in the pool of mortgage applicants. In 1992, blacks submitted just 5.6%, or 128,000, of the 2,250,000 applications. Only 25,000 of those were from blacks in black communities. Companies such as Directors Mortgage say they have open-door policies and don't discriminate; yet in 1992 the Riverside, Calif., company took in just 51 loan applications from largely black areas, out of its total of 24,830.

"The issue of application rates is absolutely critical to closing the disparity in terms of dollars that are lent to communities of color," Rev. Stith says. "It's impossible to get from where we are to where we need to be if lenders don't aggressively market in these communities."

The place to find aggressive marketing is in suburbs such as Carol Stream, about 25 miles west of downtown Chicago. With thousands of newly built tract homes for young, up-and-coming families, mortgage bankers flock to it. One of their first stops is at the Coldwell Banker office, the most active real-estate agency in town.

Nancy Taylor, who manages the office, says she gets about 20 visits a week from loan officers. Some drop in repeatedly, begging to see her and pestering her agents. Rate sheets and other promotional materials pour into the office. "We get very good at standing over our garbage cans going through our mail," she says.

TARGETING THE SUBURBS

Among the national lenders bombarding Ms. Taylor and her staff is Norwest Mortgage. The subsidiary of Minneapolis-based Norwest Corp. attracts more applications for home-purchase loans than any other lender, many from first-time buyers. Norwest Mortgage has 707 offices across the nation, mostly in places such as Carol Stream. The way Norwest builds market share is "to go after the suburbs first," President Mark Oman says. "We start small, hire a few people, gain name recognition and spread to an adjoining market. We tend to ring a city before we go into the heart of it."

But going into the heart seldom means a heavily black urban core. Norwest has no office in South Central Los Angeles, though it has 19 in the region. In Chicago, it recently closed two offices that were near the black South Side. Mr. Oman declines to specify how many of the firm's 2,800 loan officers are black but says 8% belong to minority groups, up from 5.3% in 1992.

Even Norwest isn't aggressive enough to win most of Ms. Taylor's business. PNC Mortgage does. It pays for a lot of the Coldwell Banker office's advertising, offers loan-fee discounts to her customers and sponsors home buyers' seminars at a pizza restaurant. Once, PNC took her agents on an open-house tour complete with a catered lunch. The upshot of such lavish attention is that her customers, even those with credit problems, almost always get loans. "We have lots of options," she says.

Real-estate agents in heavily black communities almost never get perks such as catered tours, and mortgage options are relatively few. With competition weak, the result is a lot of disappointed would-be home buyers and rampant abuses, such as price gouging.

Last year, for example, a Fleet Financial Group Inc. unit settled complaints that it preyed on blacks in Georgia by charging usurious interest rates of up to 30%. It agreed to pay $35 million of concessions, including cash refunds and interest-rate reductions, and make $70 million in low-interest loans over a five-year period. "There were practices there that were inappropriate and we fixed them," says Michael Zucchini, vice chairman of Fleet, of Providence, R.I.

STRUCTURAL PROBLEM

In many ways, the problem is structural. To drum up business, major mortgage bankers don't use the kind of mass-media advertising, much less retail branches, that commercial banks do. Instead, they tap what are known as marketing channels. The richest channels are real-estate brokers and independent mortgage brokers, who tend to cluster in suburbs. Other channels for referrals include big corporate employers and existing customers. All these channels tend to yield few new African-American customers.

Prudential Home Mortgage, for example, doesn't have a walk-in branch in Newark, N.J., a predominantly black city where its parent, Prudential Insurance Co. of America, is based. In fact, it doesn't have one anywhere. Its roving sales force concentrates on getting contracts from major companies relocating employees.

Moreover, "there is a skew away from blacks being relocated. I don't know if that reflects corporate America or what," says Douglas Rossbach, Prudential Home Mortgage's senior vice president for marketing. He adds: "We can't drive people into a branch if we don't have any. The issue comes down to how much [black business] can be obtained through the way the company is set up."

Like Prudential, PNC Mortgage makes thousands of loans without ever seeing its borrowers or their neighborhoods. Inside PNC's telemarketing headquarters, in an office park in suburban Lombard, Ill., the chasm between mortgage bankers and low-income black borrowers is palpable. Cubicles full of well-dressed, mostly white salespeople make calls around the country, using leads from the channels, and tap at computers while posing scripted questions such as: "Does the buyer have sufficient funds to close this loan?"

EFFICIENT AND PROFITABLE

The impersonal, volume-driven system tends to weed out quickly a prospective borrower who has had a car repossessed or once filed for personal bankruptcy. But it is efficient and highly profitable. Last year, 38 mortgage consultants at Lombard closed 7,600 loans—200 per person—without leaving their seats. A local S&L officer typically writes 100 to 150 loans a year.

PNC says it plans to attract more black borrowers by opening branches, loosening underwriting criteria and contracting with credit-counseling groups in inner-city areas. "We have underserved our cities," says Walter C. Klein Jr., its chief executive. "I should kick myself in the butt for it." (PNC, formerly Sears Mortgage, was sold by Sears, Roebuck & Co. last year. Mr. Powell, the real-estate agent, says, "I never knew Sears was in the mortgage business.")

Mortgage bankers underserve blacks through their choice of turf and operational structure, but also by the cookie-cutter loans they favor. Their products are geared to once-over-lightly underwriting, high-speed processing and immediate sale to outside investors. The investors, mainly Federal National Mortgage Association and Federal Home Loan Mortgage Corp., scoop up huge pools of mortgages based on assurances that they fit rigid formulas.

The two companies, which are privately owned but were created by Congress and

HOW THE DATA WERE ANALYZED

The accompanying article and tables are based on The Wall Street Journal's analysis of 2,250,000 loan applications received by U.S. lenders in 1992 and of data on the 1990 racial makeup of census tracts.

The analysis focused on applications for mortgages to buy one-family to four-family residences, including mobile homes. Applications that did not specify the loan amount and the applicant's race, sex and income were eliminated, as were those for which accurate census-tract data weren't available.

To assess lenders' interest in marketing loans in predominantly black neighborhoods, the Journal first counted the number of applications each lender received on property in all U.S. census tracts. It also calculated the number of applications a lender received on property in census tracts where blacks make up at least 75% of the population.

The Journal next computed the percentage, or share, of applications a lender garnered in all states in which it operated, and then the share of applications a lender received from census tracts with a black population of 75% or more.

For each lender, a share ratio was derived by dividing its percentage of predominantly-black-area applications by its overall share of applications. A ratio of one indicates equal penetration in black and nonblack areas. A ratio less than one shows less marketing penetration in black areas than white, and a ratio greater than one shows more penetration in black areas.

Under government rules, lenders and their affiliates and subsidiaries report separately and so are shown that way on the list below.

THE WALL STREET JOURNAL TUESDAY, AUGUST 9, 1994

MORTGAGE BANKERS WITH MOST UNBALANCED PATTERNS

Lenders from the 100-largest list, ranked by the ratio of company's share of predominantly black-area applications to share of all applications in states where it operates. Based on nationwide data for 1992.

LENDER AND HOME STATE	TOTAL APPLICATIONS RECEIVED	APPLICATIONS FROM BLACK AREAS	BLACK SHARE RATIO	LENDERS' COMMENTS
Accubanc Mortgage Corp., Texas	7,720	5	0.05	Purchased in October 1992 from the Resolution Trust Corp. by a private group after the agency seized El Paso Savings & Loan, Accubanc's former owner. Company moving to implement new fair-lending policies.
Chase U.S. Consumer Services, N.Y.	4,289	4	0.06	Caters to affluent customers with minimum $350,000 loans. Other mortgage units of Chase Manhattan Corp. (Chase Home Mortgage and Troy & Nichols) have significantly better records in attracting borrowers from black areas.
FBS Mortgage Corp., Minn.	7,932	12	0.09	Most largely black sections in its market area are in Milwaukee, where it is relatively inactive. Much lending focused on Minneapolis/St. Paul, which has few black neighborhoods.
Directors Mortgage Loan Corp., Calif.	24,830	51	0.15	Operates in fair, non discriminatory manner. Became aware of ineffective marketing to blacks last year. Recruiting minority mortgage brokers and re-examining policies.
U.S. Bancorp Mortgage Co., Ore.	13,689	16	0.21	Active in rural areas where few blacks live and in cities with few largely black areas. Offers programs to educate and attract minority home buyers, including low-down-payment loans.
Atlantic Coast Mortgage Co., Va.	3,964	26	0.23	Lending focused on parts of Virginia and Tennessee with few largely black neighborhoods. Recent expansion includes more such communities. Participates in local home buyers' seminars.
Guild Mortgage Co., Calif.	3,949	10	0.23	Offices are thinly dispersed in many states, so comparison to more geographically concentrated lenders is unfair. "Everyone at Guild is very in tune with fair lending," an official says.
Principal Mutual Life Ins., Iowa	12,204	48	0.26	Preoccupied with refinancing mortgages of existing customers instead of new business and bought 1/3 of its mortgages from third parties. Began addressing minority lending deficiencies last year.
Mellon Mortgage Co., Colo.	3,729	7	0.26	This subsidiary and Mellon Bank are linked operationally so records should be considered jointly (bank's share ratio is 2.78). Company says its limited operations in some cities distort results.
Inland Mortgage Corp., Ind.	13,081	74	0.28	Located in predominantly white suburbs where lucrative, large-balance loans are abundant. Recently initiated inner-city marketing efforts. The fair-lending "responsibility has caught up to us," a spokesman says.

are implicitly backed by the U.S. Treasury, insist, for example, that borrowers' debt service be less than 28% of their gross income, that they have worked at least two years at the same type of job, and that they had no more than two late credit-card payments in the past year. Exceptions require extra paperwork and gum up the works. Low-income black borrowers tend to have lots of exceptions.

Countrywide Funding became a huge mortgage underwriter by drastically streamlining the approval process and thus pleasing third parties that send it most of its business. "What is of interest to the referrer is how fast you process a loan. What distinguishes you is price and service, because the product is a commodity," says Jerry Baker, managing director of production for the unit of Countrywide Credit Industries Inc.

BROKERS BLAMED

Mr. Baker blames Countrywide's poor penetration in black communities on its "business partners," such as independent mortgage brokers, who are free to pursue loans wherever and to whomever they wish. Because the mortgage brokers are paid on commission, they gravitate to places where home prices and sales volume are high and where borrowers' creditworthiness is easy to assess. Countrywide has opened several offices in black areas and is trying to link up with more black mortgage brokers, he says. As part of this effort, it hands out a short video, narrated by James Earl Jones, the black actor, and featuring black homeowners.

But fair-lending advocates question the sincerity of such efforts. What black home buyers really need, they say, is a wider variety of products and more-flexible underwriting. Ronald Branch, president of an association of black real-estate agents in Chicago, figures that sales in his office would rise 10% if he could get a loan package to help small investors buy and fix up homes. "I've been talking about this for several years, but lenders say the risk is too high," Mr. Branch says. "It's like our money doesn't spend."

A few major mortgage bankers do have a long history of serving largely black communities. Better than most is Margaretten, a unit of Margaretten Financial Corp. of Perth Amboy, N.J., whose share of applications in largely black markets is 2.5 times its overall share. Margaretten loan officers are fixtures in black enclaves of Philadelphia, Miami, Washington and Chicago, and they are skilled at teasing out of a loan applicant information that helps justify, say, a chaotic job history and enables the applicant to qualify.

Margaretten's Leonard Flowers, a 31-year-old African-American loan officer, often counsels borrowers for six months before they apply. One client, Katherine Parker, a welfare caseworker, almost gave up on buying her $55,000 brick bungalow after one lender balked, citing credit problems lingering from her 1986 bankruptcy. Advised by Mr. Flowers, she says she cleared up the matter after lots of phone calls and letters. Without extra help, Mr. Flowers estimates, 90% of his borrowers wouldn't get approved.

'A KIND OF MORALITY'

"We think minority loans are quality loans," says Felix Beck, chief executive of Margaretten, which Chemical Banking Corp. of New York acquired last month. "There's a kind of morality that pervades everything we do."

But Margaretten is no charity. The profitable company doesn't bear any risk on most of its loans because the Federal Housing Administration guarantees them. FHA loans, made through private lenders, are widely available in black neighborhoods, but conventional loans, on which underwriters retain the risk, are not.

Although a blessing to buyers such as Ms. Parker, FHA loans also are a curse. Defaults on them have been high for two decades because lenders tend to be careless and borrowers marginal. Nationwide, the FHA default rate averages 11%—it exceeds 39% in some areas for certain periods—and is more than double the estimated rate for all home loans. Last year, the FHA paid off more than 79,000 default claims at a cost of $4.9 billion, and its accumulated operating deficit is $6.3 billion, according to its fiscal 1993 audit.

And neighborhoods can be devastated. Once in foreclosure, an FHA property can sit vacant, caught in red tape, for five years or more. One boarded-up house on a block can erode property values, and soon other board-ups loom around it. In six hard-hit sections of Chicago, 12.5% of the FHA loans that Margaretten made between 1986 and 1989 ended in default, according to research by the National Training and Information Center, a Chicago advocacy group. Fleet Mortgage, another huge FHA lender, had a 16.5% rate.

And however moral, Margaretten wasn't reluctant to impose steep charges. Until late 1991, a $20,000 Margaretten mortgage could cost up to five percentage points more in up-front fees than a $120,000 one, Mr. Beck says. Federal regulators have limited the industrywide practice, known as tiered pricing, to a maximum fee differential of two points. "The market should allow you to charge what you need to charge," Mr. Beck says. "We did that, and we're not ashamed of it."

A MAVERICK LENDER

In any case, these are the kinds of headaches that most big mortgage bankers prefer to avoid. They frankly admit that they are creatures of the suburbs and say entrenched players have heavily black areas locked up. But some lenders have discovered that they can crack these markets and earn acceptable returns.

In 1989, American Savings Bank, based in Stockton, Calif., and controlled by Texas tycoon Robert Bass, decided it wanted to become a leader in inner-city lending. Starting from scratch, the thrift has earned praise in places such as Oakland, Calif., and South Central Los Angeles. It opened neighborhood branches and staffed them with black "urban lending specialists" who must lend within low-income boundaries and earn commission rates 50% higher than other loan officers get.

By 1992, American had granted $145 million of mortgages to California blacks, about half as much as BankAmerica Corp., which has 11 times its assets and far more marketing clout. In South Central L.A. last year, American made three times as many home-purchase loans as BankAmerica. And it has been solidly profitable, with an average five-year return on assets exceeding 1% and a delinquency rate in low-income areas that is one-fourth that of affluent towns such as Santa Monica.

"It all comes down to being there with a branch," says American Chairman Mario Antoci. "Unless you focus on something, then things don't get done."

That is what many previously inactive mortgage bankers now say they intend to do. But many people in black communities aren't persuaded. "There are some token attempts," says Mr. Branch, the Chicago real-estate broker. "Over time, we will see if it's a show or not." ❖

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BIGGEST MORTGAGE LENDERS' PENETRATION OF BLACK AREAS

ook at the 100 lenders with the most applications in 1992, focusing on their performance in neighborhoods where blacks make up 75% or more of the population. The percentage of all applications represents a lender's portion of all applications made in the state or tes where it operates. The black share ratio is a lender's percentage of black-area applicants divided by its share of all applications. Total applications count only those for which accurate U.S. census tract information was supplied.

:R	TOTAL APPLICATIONS RECEIVED	LENDER'S SHARE OF ALL APPLI-CATIONS	APPLI-CATIONS FROM BLACK AREAS	LENDER'S SHARE OF BLACK-AREA APPLI-CATIONS	BLACK SHARE RATIO	SHARE RATIO RANK*
ubanc Mtge. Corp.	7,720	0.7%	5	†	**0.05**	97
erican Home Funding	11,529	2.1	140	1.1%	**0.52**	70
erican Residential Mtge.	26,564	1.2	311	0.9	**0.72**	48
erican Savings Bank	10,296	2.2	177	8.6	**3.91**	1
south Mortgage Co.	5,242	0.8	100	0.7	**0.95**	36
or National Mortgage	6,810	0.6	104	0.6	**0.90**	37
s Mortgage	5,439	0.5	61	0.5	**0.98**	35
ntic Coast Mortgage	3,964	1.1	26	0.3	**0.23**	89
c One Mortgage Corp.	7,967	0.5	290	1.1	**2.10**	9
cBoston Mortgage Corp.	6,997	0.4	69	0.2	**0.55**	66
cplus Mortgage Corp.	9,378	0.5	125	0.4	**0.81**	45
k of America	30,689	10.1	267	13.0	**1.28**	23
k United of Texas	23,449	1.1	451	1.4	**1.27**	24
claysAmerican/Mortgage	8,446	0.4	74	0.2	**0.54**	68
ifornia Federal Bank	3,817	0.7	23	0.4	**0.50**	72
terbank Mortgage Co.	4,087	0.3	44	0.2	**0.56**	61
ase Home Mortgage Corp.	5,093	0.3	44	0.2	**0.55**	65
ase U.S. Consumer Svcs.	4,289	0.3	4	†	**0.06**	96
emical Bank	6,439	0.3	248	0.7	**2.14**	6
emical Residential Mtge.	10,079	0.6	362	1.1	**2.02**	10
llateral Mortgage	3,740	0.4	88	0.5	**1.12**	28
lonial Savings	4,872	0.8	81	0.7	**0.89**	39
rinthian Mortgage Corp.	4,842	0.3	34	0.2	**0.56**	64
untrywide Funding Corp.	31,482	1.4	155	0.4	**0.30**	84
ester Mortgage Corp.	3,735	3.0	116	2.1	**0.68**	50

LENDER	TOTAL APPLICATIONS RECEIVED	LENDER'S SHARE OF ALL APPLI-CATIONS	APPLI-CATIONS FROM BLACK AREAS	LENDER'S SHARE OF BLACK-AREA APPLI-CATIONS	BLACK SHARE RATIO	SHARE RATIO RANK*
CTX Mortgage	22,686	1.5%	221	0.9%	**0.62**	55
Directors Mtge. Loan Corp.	24,830	2.0	51	0.3	**0.15**	92
Dominion Bankshares Mtge.	4,557	0.4	272	1.1	**2.64**	3
Eastern Mortgage Services	4,432	1.7	69	1.1	**0.66**	52
Empire of Amer. Realty	7,298	0.3	124	0.3	**1.05**	33
FBS Mortgage Corp.	7,932	0.4	12	†	**0.09**	93
First Federal of Michigan	5,125	6.1	135	6.5	**1.06**	32
First National Mortgage Corp.	3,936	1.8	252	3.4	**1.89**	13
First Nationwide Bank	6,372	0.6	183	1.2	**1.92**	11
First Security Savings Bank	5,375	1.7	76	1.0	**0.62**	56
First Union Mortgage Corp.	8,267	0.4	66	0.2	**0.49**	73
First Wachovia Mtge. Co.	5,382	1.0	173	1.1	**1.15**	26
Fleet Bank R.I.	16,842	0.8	481	1.4	**1.85**	14
Fleet Mortgage Corp.	8,668	0.4	235	0.7	**1.72**	18
Fleet Real Estate Funding	8,210	0.4	278	0.8	**2.10**	8
GE Capital Mortgage Services	4,325	0.2	28	0.1	**0.41**	78
Glendale Federal Bank	4,097	0.9	63	1.5	**1.75**	16
GMAC Mortgage Corp.	24,397	1.1	255	0.7	**0.65**	54
Great Western Bank	19,668	1.4	230	0.9	**0.69**	49
Great Western Mtge. Corp.	7,599	0.7	187	0.8	**1.08**	30
Green Tree Financial Corp.[1]	51,864	2.3	323	0.9	**0.40**	79
Guild Mortgage Co.	3,949	0.5	10	0.1	**0.23**	88
Home Savings of America	36,727	2.3	344	1.4	**0.61**	58
Huntington Mortgage Co.	9,467	0.4	245	0.7	**1.57**	19
ICM Mortgage Corp.	10,316	1.2	113	0.6	**0.51**	71

LENDER	TOTAL APPLICATIONS RECEIVED	LENDER'S SHARE OF ALL APPLI-CATIONS	APPLI-CATIONS FROM BLACK AREAS	LENDER'S SHARE OF BLACK-AREA APPLI-CATIONS	BLACK SHARE RATIO	SHARE RATIO RANK*
Independence One Mtge.	8,071	0.4%	423	1.4%	**3.41**	2
Inland Mortgage Corp.	13,081	1.1	74	0.3	**0.28**	85
Investors Savings Bank	4,834	2.2	5	0.2	**0.07**	94
Keycorp Mortgage Inc.	6,082	0.4	106	0.4	**1.15**	27
LaSalle Talman Bank	4,570	3.5	254	8.5	**2.41**	5
Lincoln Service Corp.	4,025	0.2	57	0.2	**0.89**	38
Manufac. & Traders Trust	3,927	1.9	49	1.0	**0.53**	69
Margaretten & Co.	30,125	1.7	1,064	4.3	**2.47**	4
Market Street Mortgage Corp.	5,104	1.2	150	1.2	**1.04**	34
Maryland National Mtge.	11,239	2.9	374	4.3	**1.48**	20
Medallion Mortgage Co.	7,054	1.3	26	1.1	**0.86**	40
Mellon Mortgage Co.	3,729	1.6	7	0.4	**0.26**	86
Meridian Mortgage Corp.	6,222	0.5	59	0.3	**0.62**	57
Metropolitan Federal Bank	7,874	2.7	4	0.2	**0.07**	95
Molton, Allen & Williams	4,197	0.6	63	0.5	**0.83**	43
National City Mortgage Co.	8,856	0.7	125	0.5	**0.75**	46
NationsBanc Mortgage Corp.	24,479	1.9	659	2.6	**1.40**	21
NBD Mortgage Co.	5,689	1.0	120	1.2	**1.20**	25
NewAmerica Savings Bank	4,501	0.4	28	0.1	**0.36**	82
North American Mortgage Co.	19,745	1.5	159	0.9	**0.61**	59
Norwest Mortgage	67,558	3.0	641	1.8	**0.59**	60
NVR Mortgage	6,889	0.5	95	0.4	**0.81**	44
Oakwood Acceptance Corp.[1]	8,218	1.6	369	3.3	**2.11**	7
PaineWebber Mtge. Finance	4,480	0.6	207	1.1	**1.79**	15
PHH U.S. Mortgage Corp.	8,860	0.4	48	0.1	**0.35**	83

LENDER	TOTAL APPLICATIONS RECEIVED	LENDER'S SHARE OF ALL APPLI-CATIONS	APPLI-CATIONS FROM BLACK AREAS	LENDER'S SHARE OF BLACK-AREA APPLI-CATIONS	BLACK SHARE RATIO	SHARE RATIO RANK*
Phoenix Mtge. & Invest.[2]	6,637	6.5%	—	—	—	—
PNC Mtge. Corp. of Amer.[3]	44,499	2.0	321	0.9%	**0.45**	76
Principal Mutual Life Ins.	12,204	0.6	48	0.2	**0.26**	87
Prudential Home Mtge.	23,810	1.1	167	0.5	**0.44**	77
Real Estate Financing	5,197	1.6	7	0.9	**0.56**	63
Ryland Mortgage Co.	6,535	0.5	41	0.2	**0.38**	81
Sears Savings Bank	4,314	0.2	13	†	**0.19**	91
Security Pacific Housing[1]	26,204	1.2	275	0.8	**0.65**	53
Shawmut Mortgage Co.	6,476	1.8	49	1.0	**0.54**	67
Source One Mortgage	9,834	0.5	87	0.3	**0.56**	62
SouthTrust Mobile Services	4,497	1.1	88	0.8	**0.75**	47
Standard Federal Bank	11,447	4.6	106	2.1	**0.46**	75
Sunbelt National Mtge. Corp.	4,314	0.4	53	0.3	**0.85**	41
Temple-Inland Mtge. Co.	10,680	0.7	125	0.5	**0.68**	51
Third Federal Savings & Loan	4,998	4.6	41	1.8	**0.39**	80
Troy & Nichols	5,924	0.6	132	0.8	**1.30**	22
Trustcorp Mortgage Co.	6,529	0.8	99	0.7	**0.84**	42
U.S. Bancorp Mortgage Co.	13,689	1.9	16	0.4	**0.21**	90
UFSB of Indianapolis	13,392	1.5	277	1.7	**1.10**	29
Valley National Bank[2]	5,240	11.6	--	—	—	—
Wash. Mutual Savings Bank[2]	11,108	10.9	—	—	—	—
Waterfield Financial Corp.	3,920	1.2	53	1.3	**1.06**	31
Western Federal S&L	5,603	1.8	72	3.5	**1.89**	12
Weyerhaeuser Mtge. Co.	8,402	0.6	210	1.0	**1.75**	17
World S&L Assoc.	18,501	1.1	145	0.5	**0.49**	74

rge percentage of applications is on mobile homes. There are few mobile-home tracts in areas where black population is 75% or more.
oes not operate in states where there are 75%-tract black areas.
ormerly Sears Mortgage Corp.

* No. 1 represents best penetration of black areas
† Share less than 0.05%

The article and accompanying tables are based on a study by Edward P. Foldessy, Wall Street Journal news systems editor, of computer tapes obtained from the U.S. government.

The New York Times

DATE: 8-2-94
PAGE: A1

In Selma, Everything and Nothing Changed

By PETER APPLEBOME
Special to The New York Times

SELMA, Ala. — Bob Mants came to the Alabama Black Belt to work for civil rights in 1965 and still has a cattle-prod scar in his back to remind him of "Bloody Sunday," the attack on civil rights marchers here that evoked the worst of the dying empire of Jim Crow.

Mr. Mants is still here working as director of a hand-to-mouth economic development agency, trying to bring jobs to desperately poor Lowndes County. But his dream that he would wi[illegible]ss an old order steadily giving way to a new and better one died long ago.

"I thought back then, if there was any place I wanted to raise my kids, it would be here, because they could see black people moving forward, advancing ourselves as a race," said Mr. Mants, 51, who on that fateful Sunday stood second in line behind John Lewis, now a United States Representative from Georgia, as mounted sheriff's deputies attacked and sprayed tear gas on marchers advocating voting rights. "I was naive. People may even be poorer now than when I came here in 1965. The progress hasn't taken place."

No one can say the old Alabama cotton country is the same place it was during the 1960's, when civil rights workers — blacks like Jimmie Lee Jackson and whites like the Rev. James Reeb and Viola Liuzzo — were killed trying to get blacks the right to vote; when the Black Panther Party was formed in Lowndes County, and when Bloody Sunday and the Selma-to-Montgomery march led to the Voting Rights Act of 1965.

Today, in a region where they were long denied the right to vote, blacks hold as much political power as any other place in America, controlling most of the local and county governments in this southwest corner of the state.

But instead of a place transformed, the Black Belt, so named for the color of its soil, not the bulk of its population, is a reminder that though the civil rights movement ended one world, it did not create another.

The schools here are generally still segregated, with the old white public schools virtually all black and the whites — working class as well as wealthy — in private academies. The racial violence of the past is largely gone, replaced by a flood of drug-related, black-on-black crime that dwarfs the violence of Jim Crow. The civil rights leaders of the 1960's are now the entrenched political class, but the state-mandated tax code still protects the interests of the white landowners who preceded them. The median family income of $18,349 is about half the national average and $10,000 below the state average, in a state that is one of the poorest.

New South and Old

Third of four articles.

Perhaps worst of all, it is a place where blacks and whites, like punch-drunk boxers, are still fighting the same old battles of race.

"If the swords had been laid down long ago, things could have progressed further," said James E. Ware, who is black and who now heads the Dallas County welfare department in Selma. "Here we are the cradle of the civil rights movement, the mecca of the Voting Rights Act. You'd think that with all the sacrifices that were made and the lives lost, we could have found a way to capitalize on it. What saddens me most is that we've never done that."

The Economy

Stark Poverty And Tax Breaks

The rich black humus of the Black Belt was built up over millions of years from the remains of the limey shells of tiny organisms in what was once a shallow marine sea.

The black soil begat cotton, and cotton begat a flourishing economy based on slavery. And just as millions of years of geologic history determined the Black Belt's economic destiny, the economics of the past have shaped the identity of the Black Belt today, a place that is 66 percent black and one of the poorest parts of the United States.

With its enduring landscape of white-columned antebellum houses and weathered shotgun shacks, its elaborate social ritual of cordiality masking dense layers of turmoil, the Black Belt defines the South of William Faulkner, where the past is inseparable from the present, where the dead still walk, and where everything has changed and nothing has.

The past is alive in the ledger dating to 1928, proudly displayed in the rickety, frozen-in-time Old Beechwood Grocery near Hayneville, with its rolling pine floors, dusty canned foods and a 1937 Chevy and a 1940 Packard rusting outside. It is alive in the 19th-century portraits of the founders of the J. B. Hain Company, a cotton and agricultural firm that operates from the back of the Old Sardis Store south of Selma. It is alive in the countless Old South and Civil War and civil rights and Bloody Sunday observances with which blacks and whites celebrate their separate histories.

And mostly it is alive because, for all the sacrifice and triumph of the civil rights era, nothing touched the economic structure that continued to give whites control of the land, the jobs and the capital as well as the tax system that revolves around them.

"When the civil rights movement ended, institutional building didn't begin," said Rose Sanders, who is black and a prominent civil rights lawyer in Selma. "People were so elated to have a victory, to have a President say, 'We Shall Overcome' and sign the Voting Rights Act, that many people thought the battle was over. That was our critical mistake. Now there are less institutions, particularly economic institutions, that meet the needs of black people than there were 30 years ago."

The statistics are dismal. Though the South led the nation in population growth in the 1980's, the 10 Black Belt counties saw their population fall by 13 percent, to 187,994, with a net migration out of 29,052 people.

More than half the blacks live in poverty, led by Wilcox County, where the black poverty rate is 60 percent. Only 10 percent of Wilcox County's whites live in poverty. In Lowndes County 5.8 percent of whites live in poverty and 50 percent of blacks do. In Selma, home to most of the Black Belt's wealth, median household income for whites is $25,580. For blacks it is $9,615.

Selma, with a city population of 24,000 and a metropolitan area of 31,000, lost one of its economic underpinnings in 1978 when Craig Air Force Base closed, taking 2,400 jobs with it. The agricultural economy that supported many small black and white farmers during the civil rights era has collapsed, leaving the industry to big agricultural and timber interests.

"I made loans 30 years ago of $100 secured by a mule, a wagon and a plow to put in a crop," said Richard P. Morthland, who is white and the chairman of the People's Bank and Trust Company of Selma. "Since then, the whole system of sharecropping has fallen to pieces. Thirty years ago, a farmer who had $100,000 in his equipment was a major investor. Today, you couldn't buy one cotton picker for $100,000."

Other than the jobs no one wants, like those at the nation's largest toxic-waste dump, in Emelle, about 100 miles northwest of Selma, almost none of the industrial plums that the South has won in recent years have come to the Black Belt, the Mississippi Delta or any of the other largely black areas of the rural South.

"A lot of these corporate representatives or folks in economic development will tell you that corporations are reluctant to locate in places where the black population is 35 percent or more," Mr. Mants said.

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To climb out of poverty, blacks depend on some of the worst schools in the nation. Testimony in a landmark school-equity lawsuit last year described Black Belt schools as having sewage leaking onto playgrounds, library books infested with termites, fire ants roaming the concrete floors and tables supported by milk crates.

In the city of Selma, and nearly all of the surrounding counties, public schools are virtually all black, particularly once students get to high school. The one exception is in Dallas County, outside Selma, where there is still a fair degree of integration in schools that are 75 percent black. Indeed, in many of the small cities of the South, where the black population is not as dominant as it is in Selma, the city schools are largely black and most whites go to the county schools, which are usually controlled by whites.

In Alabama, the problems of poverty are compounded by a state tax code that leaves most of the wealth base off the tax rolls, making the black electoral gains in the Black Belt a hollow victory.

The tax code is a result of legislation passed in 1972 and affirmed in 1978 and 1982 giving extraordinary tax breaks to landowners; in the Black Belt that means the white owners of the timber and farm land. The legislation pegged the value of farm and forest land at an arbitrary value set in 1982 and said that value could not be increased. As a result, an acre of timberland that is taxed at $3.93 to the east, in Georgia, and more than $4 to the west, in Mississippi, is taxed at only $1 in Alabama.

"It doesn't matter what color gets elected at the city or county level," said Keith Ward, an Auburn University political scientist and an expert on Alabama's tax policies. "They have no authority to make the tax burden any more equitable than it now is."

Many blacks and whites say the problems also reflect the reality that more than improving education, black control of the schools has simply shifted the flow of patronage jobs, to blacks from whites, in an area where local government jobs are often the only jobs.

"Blacks didn't have a problem with the model of political power," said Wayne Flynt, a white professor at Auburn University professor who has led the state's efforts to overhaul education, often finding himself on the side opposite from educators in poor black areas. "Their only problem was that it was whites who were in control of handing out the jobs. We've gone from patronizing, condescending, self-serving white rule to patronizing, condescending, self-serving black rule."

The Races

Resegregating The Schools

In the spring of 1990, just as Selma was preparing to commemorate the 25th anniversary of Bloody Sunday, something eerie happened.

Amid torrents of rain, the Alabama River crested at its highest level in 100 years. Elmwood, the city's oldest cemetery, was flooded, sending coffins bobbing to the surface.

It summed up a year's worth of turmoil that showed once again that racial division here has not died.

First came a battle between blacks and whites over who would control the commemoration of Bloody Sunday. Next came a showdown over Selma's first black school superintendent, whose contract was not renewed by the school board in a vote along racial lines. After that came a boycott and takeover of the schools by blacks led by Mrs. Sanders and her law firm. Schools were shut down for a week amid threats that blacks would shut down the city as well.

In the ultimate role reversal, the National Guard was called in to protect minority — that is, white — students and keep the peace. When the unrest was over, Selma was on the way to resegregating its schools. Selma High School, where 411 of the 1,200 students were white in 1989, now has only a handful of whites, most of them orphans from the city's Methodist Children's Home who have no alternative.

Mrs. Sanders argues that the boycott was needed to end the education policy of tracking, in which blacks were routinely steered to the slower classes, leaving the accelerated ones for whites.

"The same people that were told 100 years ago that they couldn't build businesses, that they were inferior, have an educational system that reinforces the same thing today," she said.

Blacks do not have to go back 100 years to find reasons to be suspicious. In the mid-1980's, an extensive Federal investigation of allegations of voter fraud in the Black Belt produced indictments of eight black elected officials. The prosecutions resulted in only one felony conviction, which was later overturned and one plea bargain for a guilty plea on a misdemeanor charge. Many black politicians were left convinced that whites would do anything to roll back black gains.

But though most people believe that tracking was an issue, there is much dispute about how pervasive it was. And even many who think tracking was a problem say the boycott was so divisive that it all but killed community support for the public schools.

Whites, many of whom had worked to build and maintain the interracial makeup of the public schools, were embittered. The resentment only deepened over time among working-class whites, who pay taxes to public schools they believe they cannot use and then pay for private schools they believe they cannot afford. Many believe that the real agenda of the boycott was to recreate a world that guaranteed black valedictorians, black homecoming queens and black class presidents — a return to segregation, only this time with the public resources going to blacks.

"My kids went to school with black kids, they made their first communion with black kids, they competed in school with black kids, and to me that was a wonderful thing," said Alston Fitts, who is white and who works for the Edmundite Missions, a Roman Catholic organization that does health and education work in the Black Belt. "The greatest disappointment to me was how much of that was swept away by the debacle. I remember my friends telling me, in great distress, that their children were now more racist than their parents had ever been, not out of ignorance but out of bitter experience that they were generalizing and making absolute."

Even many blacks believe that the boycott was a disaster for the schools and for Selma.

"It was almost like an attempt to relive the 1960's that caused a lot more harm than good," Mr. Ware said. "Now whites have pretty much conceded the public school system to the blacks. But if you don't have the support of the community, if people with wealth don't invest in what you're doing, then what difference does it make who's in charge?"

Down the Road

Murky Issues Seem Daunting

Just five years ago, Selma recorded four murders. Last year it had 16, most involving young blacks killing one another. So far this year there have been five, but no one sees that slower pace as a sign of a big downturn in drugs and violence among black youths.

"We had two young black children murdered like dogs this week, only you don't kill animals the way we're killing children," Mrs. Sanders, the civil rights lawyer, said in April. "We never had crime like this in Selma. Now it's impossible to find a community in the rural South that does not have a crack house."

Unlike the morally clear goals of the civil rights era, the issues in Selma today — crime, drugs, jobs and education — are as murky and daunting as they are everywhere else. And though the politics here invariably break down along racial lines, the views of ordinary people on how to address those issues often do not.

Almost as many blacks as whites are quick to bring up welfare when they talk about why the revolution of the 1960's produced such mixed results.

"Whosoever wrote the welfare bill knew exactly how to mess up a race of folk," said the Rev. Fairro J. Brown, the black pastor of the Selmont Community Baptist Church in Selma.

He sees the shortage of jobs as Selma's biggest problem, but then says that jobs alone are not the answer — that what is also needed is a fundamental improvement in the black family.

"Most of these fellows would rather be working than to be in jail," Mr. Brown said. "Unless he's extraordinarily sorry. You know some people are so sorry they wouldn't work if you got them a job in a factory eating holes out of doughnuts."

Even among many veterans of the civil rights movement, there is a sense that the new black politicians are, well, politicians, not the exemplars of virtue they could appear to be when contrasted with the evils of segregation.

"Now that they have gotten a chance to be in office, they are doing some of the same things the white ones are doing," said Sarah Logan, a retired black teacher, who was

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dismissed in the 1960's for joining the civil rights movement in Lowndes County. "Just like the white people, they have their own little ring, their own friends to take care of."

Yet there are people here who are still trying to make things work. There are groups like One Selma, made up of 30 black and white professionals and business people who gather at a meeting room at a local hospital every Tuesday morning for earnest conversation about bridging the divide. There are Afro-centric cultural programs for black youths, run by Mrs. Sanders, that have won national praise.

People genuinely want to move forward. But in an area that is poor and black, where the glistening new South of corporate relocations and shopping malls seems as distant as Jupiter, people just don't know how.

At the time of Bloody Sunday, Selma's Mayor was a young segregationist named Joe Smitherman.

Today, Mr. Smitherman, still Mayor, sits in his office chain smoking amid a clutter of connections to the old days — 30 years of civic proclamations and photos, a shotgun leaning against a wall, old cigar boxes, an antique cash register, a Bear Bryant houndstooth hat.

Mr. Smitherman, who has skillfully slid toward the political center over the years, says this will probably be his last term. But he does not see Selma's inevitable election of a black mayor, either when he steps down or shortly after that, as fundamentally changing things.

"The old Selmians, the people of wealth, they'll still be powerful people, whoever the mayor is, whether's he's black or white," Mr. Smitherman said, the cigarette smoke curling around the City of Selma seal behind him. "You can't run a city without money. You've got to deal with bankers. It won't be the South as we've known it. It won't be Selma, Ala., as we've known it. But it will still be Selma."

Next: Voices of the two Souths.

The Washington Post

DATE: 8-2-94
PAGE: A-1

'90 CIA Memo Cited Ames's 'Lavish' Habits

Investigation Request Was Not Followed Up

By Walter Pincus
Washington Post Staff Writer

In December 1990, the CIA's Counterintelligence Center obtained information "about lavish spending habits" by veteran intelligence officer Aldrich H. Ames and requested the agency's Office of Security investigate him, according to a declassified CIA memo released yesterday.

Ames was suspect, the CIC memo said, because he had been one of the officers in the Soviet division in the mid-1980s who "had access to a number of [CIA] operations that were later compromised."

The memo listed as "lavish" Ames's 1989 purchase of a $540,000 Arlington house, apparently without a mortgage, shortly after returning from a tour in Italy. It also noted Ames had bought a white Jaguar automobile for "approximately $49,500," had exchanged $22,107 worth of Italian lira at a local bank in August 1989, and deposited $15,660 in cash on one day in 1985 and $13,500 on one day in 1986.

The December 1990 memo, released by Senate intelligence committee Chairman Dennis DeConcini (D-Ariz.) yesterday, is the first evidence that the CIA was made aware of what Ames's neighbors said they had told government investigators as far back as 1989 about his spending. Nonetheless, it was not until December 1991 that Ames was removed from the agency's sensitive, covert side. Another 1½ years passed before Ames became the prime suspect in a CIA-FBI search for a KGB mole inside the agency.

The security office was told in the 1990 CIC memo, "There is a degree of urgency involved in our request" because Ames had been assigned to the CIC three months earlier and "we are quickly running out of things for him to do without granting him greater access."

The memo ended, "It is our hope to at least get Ames through a polygraph before we are forced" to give him greater access to information. The memo's author, whose name is withheld, suggested there could "be a logical explanation for Ames's spending habits" including money from his mother's estate or from his Colombian in-laws or even borrowing.

"Nobody followed up. They didn't do anything," DeConcini said. "They had only one investigator and they sloughed it off."

Nine days after the Dec. 5, 1990 memo was written, Ames had access to a "secret" CIA document describing a Russian KGB intelligence official in Moscow who had recently been recruited by the CIA, according to court documents filed by prosecutors in his case. On Dec. 17, 1990, "Ames informed Russian intelligence officials about the identify of [this] CIA human source," court documents show.

The CIA had no comment on the memo released by DeConcini, other than to confirm it was one given to the committee. CIA officials have maintained that counterespionage cases, such as the one that caught Ames, take a long time to develop. One senior CIA official said the requested polygraph did not take place until 1991 because doing it earlier might have "spooked" or alerted Ames to the fact he was under suspicion.

Earlier this year, Ames said when he was polygraphed in 1991 there were no direct questions about his finances. One question DeConcini said he wanted answered is whether the polygrapher knew about the financial information listed in the 1990 memo.

A few months later, the CIA and FBI formed a joint task force to revive an earlier search for a mole begun back in 1987. Ames was one of more than 100 suspects who had knowledge of operations that had been compromised in the mid-1980s.

On April 28, 1994, Ames pleaded guilty to espionage charges and was sentenced to life imprisonment. He said he had turned over hundreds of classified documents and the names or descriptions of more than 12 U.S. and allied-paid Soviet and East European agents who later either were killed, imprisoned or just vanished.

DeConcini called the CIA memo "an example of bad management. This is not hindsight. They have got to make some changes. Somebody's head should roll." He also said he was investigating when and how the FBI learned about the memo, which the committee was given four months ago as part of briefings on the Ames case.

The New York Times

DATE: 8/3/94
PAGE: A14

From Atlanta to Birmingham, Blur of Progress and Stagnation

By PETER APPLEBOME
Special to The New York Times

BIRMINGHAM, Ala. — She was only 14 when she joined Martin Luther King 31 years ago in the civil disobedience that broke the back of the South's fiercest segregation, but Frances Foster White knew just where she wanted to go — the grand spiral staircase in the Pizitz department store that led to the whites-only mezzanine cafe.

"I always had a thing for Loretta Young," said Mrs. White, now a medical assistant at a local hospital, recalling the 1950's television series that began with Miss Young sweeping down a stairway in a glamorous gown. "And that's why I chose Pizitz, because I wanted to walk down that staircase, proud, with my head held high. And I did it. And it's something I'll always be proud that I did."

She was one of the children of Birmingham, the students as young as 6 who braved T. Eugene (Bull) Connor's fire hoses and attack dogs and changed the South three decades ago. What she did not know was that the spiral staircase would lead to another, and another, and another, leaving the South a blur of progress and stagnation, past and present, black and white, like the M. C. Escher etchings of endless stairways leading everywhere and nowhere.

To the extent that progress has stalled, some see the age-old ills of the South.

"You don't think people with power were just going to give it up, do you?" said Nelson Rivers, the National Association for the Advancement of Colored People's regional director for the Southeast. "They don't have the same allies in government, but the people who had the economic power 30 years ago are the people who have it now."

Others see the inability of blacks to take advantage of the new opportunities open to them.

"It's not enough to say things have not changed," said Andrew Young, the former Mayor of Atlanta. "We have not changed."

Across the South, in places like Birmingham, which is still trying to live down its past, or Atlanta, which is still trying to live up to its artful image of prosperous racial amity, or the Mississippi Delta, which is still in the grip of desperate poverty, Southerners, black and white, are still trying to make sense of it. Sometimes, they even do.

Two Mayors

Crossing Barriers, Feeling Losses

During the civil rights era, they were the two poles of the South. Birmingham, with its racial violence and terror, was branded "Bombingham." Atlanta, with its peaceful integration and go-go business leadership, became "The City Too Busy to Hate."

In many ways they are as different as ever, Atlanta the site of the 1996 Olympics, Birmingham the scene of Michael Jordan's dubious foray into minor league baseball. But when it comes to the plight of the black poor, the two intersect.

Behind his desk at Birmingham's City Hall, Mayor Richard Arrington Jr. keeps an old photograph of his neighborhood baseball team, the 1948 Fairfield Grey Sox, who played in Birmingham's old Negro industrial leagues. In the front row is a young outfielder named Willie Mays.

The photo is a memento of segregation, when Birmingham was a swaggering steel town of black smoke and open hearths, Atlanta was a hustling hub for bankers, salesmen and promoters, and the two cities, 150 miles apart on Interstate 20, were vying to see which would dominate the South.

Birmingham's racial turmoil doomed its hope of regional dominance. But the city has had a substantial renaissance over the past decade, diversifying from steel to health care, banking and services and making strides in race relations. Across from the 16th Street Baptist Church, where four black children were killed by a bomb planted by segregationists on Sept. 15, 1963, now sits the magnificent Birmingham Civil Rights Institute.

Still, there is enough friction between past and present, in endless battles over affirmative action, city contracts with minority business, that Mr. Arrington, a courtly 59-year-old former zoology professor serving his fourth term as Birmingham's only black Mayor, has the weary air of a man who has been fighting the same old battles for too long.

"I'm just a symbol here of something that frightens a lot of whites or that a lot of whites resent," Mr. Arrington said. "I am a symbol of black political strength in Alabama's largest city. I have very strong backing by the black community. I have not had to have my knees knocking every time the Birmingham News or Post wrote something about me. A lot of whites resent that."

Front Lines of Integration

Weariness is not a word that comes to mind when describing Mayor Bill Campbell of Atlanta. Energetic with wire-rimmed glasses and a quick, dry wit, he personifies the changed South that Atlanta will celebrate with much pageantry two years hence, when it plays host to the Summer Olympics.

New South and Old

Last of four articles.

The son of the head of the Raleigh, N.C., chapter of the N.A.A.C.P., Mr. Campbell, now 40 years old, integrated the Raleigh schools at the age of 7 and spent five lonely years as the only black student at his elementary school. He graduated from Vanderbilt University and Duke University Law School, came to Atlanta in the mid-1970's and in 1981 was elected to the City Council representing the district where the Rev. Dr. Martin Luther King Jr. once preached and where he now lies entombed. Last year, Mr. Campbell became Atlanta's third black Mayor, following Maynard Jackson and Mr. Young.

He has also come to represent the remarkable continuity in vision and civic promotion between Atlanta's new black mayors and its old white ones.

"I think Atlanta has dealt with its racial concerns better than any other city in this country," Mr. Campbell said, picking at a 4 o'clock lunch of sausage pizza one recent afternoon. "What people will see is the capital of the New South, a high-tech city that works. They'll see a great city at its peak."

But when asked about the nostalgia that many blacks have for the unified black community of the segregated South, with its black role models and support systems, he starts talking with surprising passion about the lost world of his father, the world of the Fairfield Grey Sox.

"There was this wonderful gumbo, self-contained, where everyone was treated with respect and dignity," Mr. Campbell said. "It didn't make any difference whether you were a millionaire or a person who washed dishes, you all lived in the same area, so the kids saw doctors and teachers and lawyers and policemen. But with integration, that all changed when the middle class moved out. The black community spent so much of its energy on fighting the social barriers that we have simply lost our ability to comprehend the terrible effect it was going to have on the black economy."

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Struggling for Prosperity

As different as Atlanta and Birmingham are, Mr. Campbell and Mr. Arrington both preside over cities that are largely poor and largely black and are struggling to get their share of the prosperity washing over their metropolitan areas.

While the Atlanta metropolitan area grew to 2.8 million in 1990 from 1 million people in 1960, the city of Atlanta shrunk to 394,017 people, 31 percent white, in 1990, from 487,455 people, 61 percent white, in 1960. Birmingham fell to 265,968 people, 36 percent white, in 1990, from 340,887, 60 percent white, in 1960.

In Atlanta, most of the growth and prosperity is coming in suburban Cobb and Gwinnett Counties. In Birmingham, it's not just out of the city but "over the mountain," on the other side of Red Mountain, in southern Jefferson and Shelby Counties.

Bill Campbell, who from the time he could walk has been living out his father's dream of an integrated South and has succeeded even beyond what his father could have imagined, would be the last person in the South to want to turn the clock back or to minimize the gains. And Atlanta's successes are precisely what his father envisioned — a better world created largely through the cooperation of blacks and whites in business, government and the arts.

But he talks for a while about the world his father knew and then, the booster voice uncharacteristically gone, he says: "If my father or if Martin Luther King were to come back down Auburn Avenue, hand in hand, I think they would be horrified. I think race was a much greater factor than anyone originally believed. It turned out that what the racists said was true — 'You can change the laws, but you can't change the minds.'"

Two Views

From Optimism To Stark Reality

Unita Blackwell came to Jackson, Miss. in June to remember Freedom Summer, when students from the North and ordinary Mississippians braved the Klan in 1964 to work for civil rights in a state where crimes, including murder, against blacks and those working with them were prosecuted about as often as the Delta fields sprouted purple cotton.

She and other veterans of the civil rights movement came to celebrate a changed world and their role in helping to bring it about. But they also confronted how far they still had to go.

"I think a lot of us 30 years ago were optimistic; we had to be to survive," said Mrs. Blackwell, then a young volunteer who later became Mayor of the town of Mayersville in the Mississippi Delta. "Since then, lots of people have been disappointed. I guess all of us in our own ways have disappointments. It wasn't long before you found out that this was a resistant society. We didn't know then how imbedded all this was in the state of Mississippi, how imbedded it is in America. You don't get rid overnight of what took 400 years to grow."

To Mrs. Blackwell and many other blacks, the civil rights movement only began to chip away at a vast empire of inequality: of black colleges that got a fraction of the dollars that white ones did, of a political structure that was all white, of an economic system in which all the money and power was in the hands of whites.

The clear lesson to her and many others is how much work still needs to be done in electing blacks to office, fighting discrimination, staying the course.

"It all ties to who we put in office," Mrs. Blackwell said. "Nothing is more important — and when I say nothing, I mean absolutely nothing — than your vote, my vote and how we exercise it. People are staying in houses because they had a vote. People have paved streets, water to drink, because they have a vote. Every economic piece in this world is hinged on some vote or other."

Different Agendas

More often than not, that vote is cast along racial lines. Indeed, unlike the biracial nature of Freedom Summer, in Southern politics today, blacks and whites come together only in passionless marriages of convenience in the Democratic Party or local city halls.

There may be much in Southern culture that binds blacks and whites — from religion and food to manners and morals — but when it comes to government, blacks and whites have political agendas almost as divergent as they were 30 years ago. Nobody in Rush Limbaugh's America professes as much hatred for government as white Southerners do. Nobody in America is as aware of what government can do for its people as black Southerners are.

Robert Proctor is a lawyer from the Atlanta suburb of Sandy Springs who has made a name for himself as an anti-tax crusader and as a critic of Atlanta's largely black city government. In blunt language, he says what many whites believe but few will say openly — that blacks cry "racism" to excuse their own failures, that blacks have gone from wanting equality to demanding special treatment, that the time is long gone when blacks can blame the past for their troubles. He oozes contempt for Atlanta's black-controlled city government.

"I think they're corrupt," said Mr. Proctor, who is 36 and whose parents became Goldwater Republicans back when Georgia was still a one-party state — that is, Democratic. "I think they're wasteful of taxpayer dollars. I don't think they attend to the basics of government, and I think a lot of what they do is for their own personal economic benefit."

He rails against government programs to foster black businesses; to Mr. Proctor, the programs simply help "a small group of blacks in Atlanta who trade political favors with each other." Asked about the legacy of slavery and Jim Crow, he says: "Should we take 50 percent of the wealth of white America and give it to black people, pay reparations, as some of them are urging? When does it end? I think what we need to do in this country, if we're truly interested in dealing with quote, unquote, racism, is we need to stop talking about race all the time. That is all we talk about: race, race, race, race, race."

Mr. Proctor's critics say that the whites who profess to hate government so much have long been the ones who most benefited from it and did business with it. Tyrone Brooks, a black State Representative in Georgia, calls Mr. Proctor "the new sophisticated racist of the 90's."

Mr. Proctor, voicing the views of many other whites, said it was blacks obsessed with race and the past who were today's racists. "I am not a member of the Ku Klux Klan," he said. "I'm one of those who sat silent for a long, long time. Increasingly, a great many people in the middle and upper middle classes in the South are saying what I'm saying, not publicly, but they're saying it to all their friends. And right now, I don't think we're heading toward any kind of solution."

Two Eras

Black Gains Vs. Tradition

John Egerton is a 59-year-old author in Nashville, the son of a traveling salesman, who has spent most of his career dealing with two great constants of the South.

One is food, Southern cooking and its six major food groups — sugar, salt, butter, eggs, cream and bacon grease. The other constant is race.

For the last five years he has been working on a book titled "Speak Now Against the Day," about a period seemingly as ancient as Byzantium, the period from 1932 to the Brown v. Board of Education decision in 1954 that declared racially segregated schools unconstitutional.

"For people then, it was like encountering a hurricane or a tornado," said Mr. Egerton, whose best-known book is "The Americanization of Dixie" (Harper's Magazine Press, 1974). "You may live in a place where those things happen, but you always think it will hit someone else. Everyone knew things had to change, but the leadership of the South absolutely abdicated responsibility. When integration finally came, no one had a sense of how to make it work. Even the people who knew it was wrong didn't have a clue how to make it right."

Forty years later, in a South that has come further than most people would have dreamed of 40 years ago, somehow the world looks much the same.

"You know, we had the chance to fix things after World War II that we had after Brown, that we have now," Mr. Egerton said. "But you talk to people on both sides of the racial divide and you don't find a hell of a lot of people who really believe the South was ever going to fix anything. It makes me cry when I hear people say, 'Maybe segregation wasn't so bad' — hear blacks say that. You could fill a phone booth with the people, black or white, who think school desegregation is important. This talk of self-segregation, it's suicidal. But you talk to whites, and it's hard to find a lot of people who can demonstrate they've learned anything either."

Enduring Turmoil

Indeed, 40 years after Brown and 30 years after Freedom Summer, racial disputes are becoming more common and the language of race more pervasive as black political and cultural gains hit the bedrock of Southern tradition and entrenched economic interests.

The struggle plays out in the battles over whether to remove the Confederate battle

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flag from the Georgia state flag or whether to stop flying it above the Capitol in South Carolina. It plays out in the court fight over the financing and autonomy of historically black state colleges in Mississippi. It plays out most significantly in the lawsuits challenging black Congressional Districts across the South.

For every Malcolm X cap worn by a black, there's a T-shirt worn by a white with the Confederate battle flag and the slogan, "You Wear Your X, I'll Wear Mine." For every T-shirt worn by a black reading, "It's a Black Thing. You Wouldn't Understand," there's a bumper sticker reading, "Don't Blame Us. We Voted for Jefferson Davis."

That so much turmoil comes after so much progress between blacks and whites is perfectly in keeping with the age-old split personality of the South. And in a region where blacks make up 18.6 percent of the population — and as much as 35 percent in the Deep South state of Mississippi — as opposed to 12.1 nationally, the South's future, now as always, is inextricably tied to how it deals with race.

But there is one very real difference from the days when the nation looked at race as the province of Bull Connor and Ross Barnett, of "Bloody Sunday" and George Wallace's stand in the schoolhouse door.

"The big difference I see from 40 years ago is that the North is caught up in the same thing," Mr. Egerton said. "Forty years ago, the North had no experience with racism, because they had always lived in essentially segregated environments. Now, they find themselves like the South in all the worst kind of ways. They're realizing now they're knee-jerk racists like the rest of us."

He paused for a moment. "Instead of getting out of the woods in 1954, we have found, all of us, that the woods are lonely, dark and deep, and we still have promises to keep. And the truth is, if we don't fix it, we all go down."

USA TODAY

DATE: 8-3-94
PAGE: 9-A

Should special districts be carved out to guarantee election of minorities? In the past week, courts in North Carolina and Louisiana took opposite sides on the issue. Now the Supreme Court likely will decide. John Anderson offers a compromise.

A way to end 'political apartheid'

In 1992, Mel Watt and Eva Clayton became the first blacks elected to Congress from North Carolina since the turn of the century. After winning their congressional primaries, they look well-positioned to win re-election this year.

But Watt and Clayton may not keep their seats for long. The U.S. Supreme Court will soon face again the issue of whether political boundaries are being manipulated to create unconstitutional "racial gerrymanders."

Despite a lower court ruling Monday dismissing a challenge to North Carolina's new black-majority congressional districts, the case is almost certainly headed back to the high court — which has already called the districts "political apartheid."

By John Anderson, former congressman and presidential candidate.

Their case and others like it at the federal, state and local levels have been portrayed as a dramatic choice between two mutually exclusive goals: Either the black-majority districts are maintained and minority voters continue to have a legitimate opportunity to elect candidates of their choice, or the districts are redrawn to avoid "bizarre" gerrymanders that undermine hopes of achieving a colorblind society.

This is a false choice.

Rather than accept the constraints of our current winner-take-all voting system, we can demand change that will provide fair representation for both the majority and for *all* significant minorities, be they blacks, Ross Perot supporters or Republicans.

Even as they grow more frustrated with politicians, many Americans accept without question our current method of electing the House of Representatives from districts with just one member who is supposed somehow to "represent" the views of those who voted an opponent. But it is time for us to recognize that today's challenges demand a more vital, more responsive, *more representative* Congress.

What might a fair voting system look like in, say, North Carolina?

One idea was proposed by those in the North Carolina case opposed to the "racial gerrymander." Their plan would replace the state's 12 single-member House districts with three larger districts, each sending several members to Congress. Because of the way North Carolina's population is concentrated, the proposed western district would elect three members, the eastern district four, and the central or Piedmont district five.

In the new districts, voters would use something called cumulative voting or preference voting. These are one-person, one-vote systems used in some American cities and counties and in many other democracies that enable more voters to elect candidates they like.

In the proposed five-member North Carolina Piedmont district, for example, cumulative voting would allow voters to allocate their five votes however they wished. That is, they could cast one vote for each of five candidates, all five votes for one candidate, three votes for one candidate and two for another or any other combination totaling five.

If 20% of the voters chose to concentrate their five votes on one candidate, they would be absolutely assured of winning a seat.

In these systems, the majority wins a majority of seats, but sizable minorities can win their fair share.

North Carolina blacks could elect at least two candidates of choice, and perhaps more, yet the districts would be compact and maintain regional communities of interest without the taint of racial gerrymandering.

More fundamentally, these systems would make a state's entire congressional delegation more responsive to voters.

No members of any race or political ideology would any longer have "safe" seats shielding them from constituents.

No more would voter turnout for congressional elections, many of them lopsided races, hover near 35%.

No more would those who control the redistricting process determine who wins and loses for the next 10 years by the way they draw the lines on the map. That power would return to where it belongs: the voters.

Proportional systems are fully consistent with the Constitution. The only barrier is a 1967 law that requires single-member districts — passed, ironically, to prevent Southern states from keeping blacks out of Congress by using winner-take-all at-large elections.

Congress should amend this law to allow states the option of using fair voting systems — and Watt and Clayton are not alone.

New congressional districts in Georgia, Florida, Louisiana and Texas that elected black or Hispanic members of the House in 1992 are also under challenge following the Supreme Court's initial ruling last year in the North Carolina case.

A federal court in Louisiana just last week imposed its own reapportionment plan, eliminating one of the state's two black-majority seats. An emergency appeal is awaiting a Supreme Court response any day.

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The New York Times

DATE: 8-5-94
PAGE: A-24

Voting Rights, Still Alive

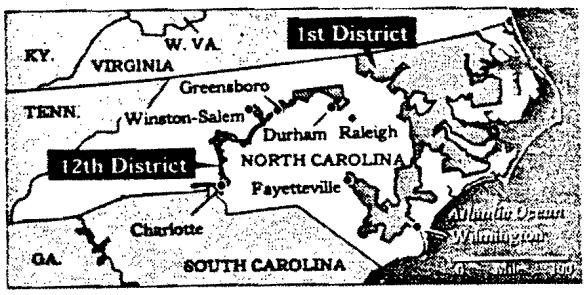
Only a year ago the Supreme Court seemed ready to nullify or at least cripple the Voting Rights Act of 1965. The Court found that two oddly shaped Congressional districts in North Carolina, drawn to give blacks a fair chance to elect representatives of their choice, smacked of apartheid. It said the districts could stand only if the state justified them under strict scrutiny in a full-scale trial.

That command struck many as part of a drive to reverse the dramatic political gains the voting law has brought to citizens long denied both the ballot and a place in American political life. But the trial has now produced a ruling upholding those strangely shaped districts, suggesting that the voting law may still be very much alive.

As the Federal court in Raleigh now explains, the line-drawing should be viewed as a reasonable way to integrate the state's Congressional delegation; the two districts elected the first black representatives from North Carolina in this century.

Under pressure from the Justice Department, the Legislature drew those odd lines for black empowerment just as they had drawn a "fishhook" district to save a white incumbent Congressman for decades. The First Congressional District in the northeast is largely rural. The more urban 12th District snakes 160 miles from Durham to Gastonia, mostly along Interstate 85 and often no wider than the highway.

The odd shape of the 12th District in particular has been lampooned as a preposterous racial gerrymander. But as Judge Dickson Phillips explained, I-85 is a pretty reasonable way to connect the cities



and industrial belt of the Piedmont Crescent in a district of shared urban values. As with the rural First District, the lines provide a bare black majority with a chance but no guarantee of electing the choice of black voters. The District Court also found the plan narrowly tailored to a compelling government interest — compliance with the Voting Rights Act and a modest, overdue measure of political power sharing.

When the case returns to the Supreme Court as expected, it will confront Justices Clarence Thomas and Antonin Scalia, who despise the voting law; the two new Justices, Ruth Bader Ginsburg and Stephen Breyer, whose views are not known, and a group of justices of varying fidelity to Congress's plan to remedy generations of political injustice. The lower court's reasoned opinion may well guide the justices by showing both the racial fairness of the North Carolina plan and the wisdom of the Voting Rights Act in prodding states to provide equal political opportunity.

Los Angeles Times

DATE: 8-5-94
PAGE: A-10

POLICE WATCH

Candid Camera

Another grainy videotape—one that appears to show a police officer beating a suspect with a series of flagrant baton blows to the head and a dropped knee to the neck—has understandably stirred up outrage, shock and concern.

Some are already comparing last Friday's incident, in which Compton police officer Michael Jackson violently subdued 17-year-old Felipe Soltero, with the taped beating of Rodney King by four Los Angeles police officers in March, 1991. But while it's easy to draw parallels between the incidents, it's also important to be mindful of the differences.

One is the swift official response. On Wednesday, two days after the release of the videotape, the FBI and the Los Angeles County district attorney launched separate investigations into possible civil-rights violations and charges of police brutality. The speed of the federal and local response is welcome and reassuring, particularly at a time of sporadic tension between ethnic groups in Southern California. In the Compton case, the officer was African American and the suspect Latino.

Still, this case points up the necessity, especially in a diverse community, for continual police education. Reports of the Christopher and Kolts commissions have proved extremely valuable and instructive for larger law-enforcement agencies like the Los Angeles Police Department and the county Sheriff's Department. But if this videotape is an accurate depiction of what happened, the same thing needs to happen in some smaller jurisdictions, like Compton.

The Washington Times

DATE: 8/5/94
PAGE: A19

MIKE ROYKO

Arriving at the bald truth on equality

A male chauvinist would take delight in Shannon Faulkner's distress. Being a more enlightened sort, I offer her understanding and compassion.

Ms. Faulkner is the young woman who went to court to become the first female cadet to attend the Citadel, a respected old military college in South Carolina.

Because the school is state-funded, a federal judge agreed with the American Civil Liberties Union, which represented Miss Faulkner, that she was entitled to join the 2,000 male cadets at the college.

The Citadel fought her suit, saying that having a female creature in the program would be a terrible pain because she could not deal with the awful military grind.

Miss Faulkner's lawyers chortled that she was more than tough enough to do anything the male cadets did, except possibly making wee-wee while standing up.

To the delight of feminists and enlightened males, the judge upheld Miss Faulkner's rights to spend her college years in the misery that is common to all sadistic military schools.

And that seemed to be that. All Miss Faulkner had to do was register, show up, and she could stick out her chest, stand at rigid attention, screech "Yes, sir!" and she could follow in the footsteps of the distinguished military figures produced by the Citadel.

But Miss Faulkner's lawyers went back to court and made a surprising request.

They asked that she be allowed to skip a traditional rite of passage for freshmen at the old military school. She didn't want her head shaved.

Instead, they suggested that she be allowed to have her hair trimmed into a fashionable short, female bob.

I can understand her feelings. When I was her age, a military barber put a clipper to my head and those of my fellow young recruits and we shuffled out, sadly rubbing our naked young scalps.

Male, female, or otherwise, when you are 19 or 20, you take considerable pride in your hair. My generation spent millions of pre-inflation dollars on Brilliantine, Wildroot Creme Oil and various smelly pomades that gave us the greasy duck-tail look that was high fashion at the time.

So it was traumatic for us to go back to the barracks, look in the mirror and see what appeared to be a new-born bird with gigantic ears looking back.

But there were valid reasons for giving skin-head haircuts to recruits. We came from all walks of life, some from rural homes that did not have a Jacuzzi, a shower or even a bathtub.

(Yes, to the amazement of the Teen News Section, there was such a time of terrible deprivation in this country. But we survived it. As a spiritual friend once said: "I wept because I had no Guccis until I saw a man who had no Florsheims.")

So it was possible that some of us had cooties and other wild things inhabiting our hair. The tiny creatures were capable of leaping from one oily skull to another, and the military didn't want us itching and scratching when we should have been marching and panting. Shaving our heads, leaving the cooties dying on the barber's floor, was the most practical way to avoid this social embarrassment.

Today, cooties are not a common problem, especially for the kind of jut-jawed bookworms who apply to the Citadel instead of going to a coed college that allows jolly beer parties and other bawdy delights.

The Citadel shaves their heads because it wants to squash their individuality and make them feel like faceless and hairless goofs, which is considered essential to the molding of the subservient military mind.

As a lawyer for the Citadel said: "The whole point is the subjugation of the individual to the interest of the group. Many cadets have described that haircut as the most humiliating moment of their lives."

But to get back to Miss Faulkner and her plea that the judge spare her hair.

One of her lawyers pleaded with the judge: "She will look strange, she will be stigmatized. You are forcing her to undergo what is considered degradation."

Actually, that is silly and insulting to millions of us. I, for one, have been without much hair for many years. I have not been stigmatized or subjected to degradation. My wife, my children and my grandchildren love me. So do many bartenders and degenerate friends.

To Miss Faulkner's chagrin, the judge said, no: If Miss Faulkner wants to attend the Citadel and receive the same grinding military education as the male students, let her head be shaved like all the young male masochists.

As one who has staunchly defended the rights of female creatures to play golf, as sadly as they do it, I must still agree with the judge.

It would be unfair for Miss Faulkner to walk around with her hair neatly bobbed while the sun glints off the scalps of her fellow freshman cadets. There is more to equality than doing pushups and jogging to the breakfast mess hall. Besides, women are known to have had cooties.

Miss Faulkner should look at the bright side, as I often do. It takes me less than 10 seconds to fashion my hair in the morning. One or two swipes with a damp towel, and every frail tuft is in place.

Her bald head will save Miss Faulkner at least 10 minutes a morning in the full-haired blow-drying, poofing, arranging and other wasted effort. That is 70 minutes a week, or about 60 hours during her freshman year.

Who knows, she might enjoy the luxury of this leisure time so much that she keeps shaving her head the rest of her life. Why not? Would the troops have responded to Gen. George S. Patton if he had flowing amber tresses?

Mike Royko is a nationally syndicated columnist.

The Washington Post

DATE: 8/5/94
PAGE: A3

Abortion Rights Activists Ask Why Law Failed

Pensacola Slayings Underscore Federal Agents' Difficulties in Preventing Clinic Violence

By Pierre Thomas
Washington Post Staff Writer

Angry abortion rights advocates have demanded to know why the new federal law designed to prevent violence and intimidation at abortion clinics proved useless to stop the murder of a doctor and his escort in Pensacola, Fla., last week.

They have asked why federal authorities were powerless to take action against the man arrested in the case, a former Presbyterian minister who had openly preached "justifiable homicide" against abortion doctors.

The advocates believe Paul Hill was part of an organized terrorist campaign against abortion clinics and they are asking the Justice Department to use the new law to protect them.

"I think [the law enforcement agencies'] standards are too rigid," said Eleanor Smeal, president of the Fund for the Feminist Majority. If a person advocates "justifiable homicide . . . stalks someone, the pattern of his actions should be considered. [Hill] should have been put under surveillance. Couldn't they have checked to see if he had weapons?"

U.S. marshals have been dispatched to 12 clinics nationwide in the wake of the killing of John B. Britton, 69, and his escort, James H. Barrett, 74, and the wounding of Barrett's wife, June, 68, last Friday.

The FBI and the Treasury Department are investigating whether Hill and his associates are part of a conspiracy. Law enforcement officials privately acknowledge they are under pressure to respond, but they point out they must navigate a minefield of constitutional questions involving free speech, religion and privacy.

Hill's actions since the killing 16 months ago of abortion doctor David Gunn underscore the difficulty the federal law enforcement system faces in preventing abortion clinic violence, police officials say. The onetime minister repeatedly staged dramatic protests that frightened clinic workers and patients, but he was charged only once with a misdemeanor.

> *"In this society we protect the right to discuss, even the discussion of killing for a cause."*
>
> — Susan Low Bloch, Georgetown University law professor

"There is a fine line between discussing violence to carry out a cause and inciting someone to use violence," said Susan Low Bloch, a professor of constitutional law at Georgetown University.

In May, Congress passed the Freedom of Access to Clinic Entrances Act (FACE), which makes it a federal crime to physically block access to clinics, damage their property or injure, interfere with or intimidate patients or staff. Intimidation must specifically involve placing "a person in reasonable apprehension of bodily harm," Justice Department officials say. Interference must include an attempt "to restrict a person's freedom of movement."

The legislation's language also makes clear that "nothing" in it "shall be construed to prohibit any expressive conduct" protected by the First Amendment's freedom of speech guarantee "regardless of the point of view expressed." The wording was placed in the measure to preclude legal challenges from those who felt FACE might infringe on the right of free speech.

Hill put the new law to the test immediately and repeatedly, police said.

On June 10, he appeared outside The Ladies Center in Pensacola and allegedly began screaming into the center's window: "Abortion is murder! Mommy, please don't kill me!" a law enforcement source recalled. A telephone call was placed to the FBI.

Within a half hour, an FBI agent responded. The agent watched Hill screaming, went inside and interviewed staff and patients.

"He could locate no witnesses that could indicate force had been witnessed by them or that it had been directed at them," said Michael Patterson, U.S. attorney for Florida's Northern District. "The agent walked through the specific elements of the FACE act and there was no indication of a violation."

Pensacola police later looked for a local statute that Hill might have violated. They concluded his conduct was prohibited under the city's misdemeanor public nuisance and noise laws. The clinic declined to seek prosecution.

Seven days later, Hill returned, screaming this time so loudly that patients inside became concerned and "staff had trouble completing ultrasound procedures." Police arrested Hill on a misdemeanor charge after warnings failed to stop the shouts.

Again, the new federal law was not brought to bear and Hill was released.

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While not commenting specifically on the June 17 incident, U.S. Attorney Patterson said, "The FACE act just doesn't talk about intimidation, but how you intimidate. You have to have force, threat of force or obstruction."

Abortion rights supporter Smeal said that Hill promoted justifiable homicide and claimed to have a group of antiabortionists who shared his views. Hill and 24 members of a group called Defense Action signed a petition outlining their stance. The group listed members from locations including Bowie; Queens, N.Y.; Des Moines, Iowa; and Portland, Ore.

"In this society we protect the right to discuss, even the discussion of killing for a cause," Bloch said. "The question is at what point are you inciting someone, versus discussing the merits of this course or that course. The complexity of this case is that you can't impede civil rights. But as [abortion clinic violence] goes on, the question of what is incitement may be modified. You have to consider the audience for these comments, the level of emotion and the environment."

The U.S. marshals, FBI and the Bureau of Alcohol, Tobacco and Firearms must now sort out when to make arrests on clinic access charges and whether there is a conspiracy. The Justice Department has been studying a possible conspiracy for more than a year through its Terrorism and Violent Crime section in the Criminal Division. But with the formation of a task force last week after the shooting, there is more structure and a revamped effort.

Agents already have begun to review the statements of Hill and others who advocate violence. They are also expected to, and in some cases already have begun, to interview clinic staff about threats.

Acquaintances of the "justifiable homicide" proponents and, in some cases, the proponents themselves also may be interviewed. The inquiry is at the preliminary stage, Justice Department officials said.

"Nasty words," may not be enough to trigger an arrest, said one source involved with the probe. "We've got to be cautious," said another law enforcement source, acknowledging the pressure to respond to the Pensacola shootings. "On the other hand, we've got to look" at these groups.

The New York Times

DATE: 8-5-94
PAGE: A-10

Slain Clinic Escort Saw Job as a Mission

By SAM HOWE VERHOVEK
Special to The New York Times

PENSACOLA, Fla., Aug. 4 — James H. Barrett flew in northern Africa in World War II, in Korea and in Vietnam, and he retired as a lieutenant colonel in the Air Force after 28 years of service. Then he took up a second career as a schoolteacher in Texas and Maryland.

So when he finally retired for good here two years ago, he joked to his friends in the North that he had earned the right to tee off on every single hole of every single one of the 41 golf courses in the Pensacola area.

He never came close. He was too busy volunteering for local charities, from walking in the March of Dimes to manning the Earth Day table at a local fair. And after an abortion doctor, David Gunn, was shot to death last year, Mr. Barrett became so angry that he volunteered to be an escort for Dr. Gunn's replacement, so that it would never happen again.

Having fought in three wars on foreign soil, the 74-year-old Mr. Barrett was not to survive a fourth, in his own country. He was killed along with the new doctor last Friday as he drove his pickup truck into the parking lot of the Ladies Center, an abortion clinic here. His wife, June, who is 68, was with him at the time and shot in the arm. She was released from a hospital on Sunday. The police have charged a 40-year-old abortion opponent with murder.

In the days since the killings, much attention has been given to the man arrested, Paul J. Hill, and to the doctor, John B. Britton. Mr. Barrett, though, was part of a wider group in Pensacola, one of more than five dozen people — many of them military retirees — willing to assume the risks of escorting women and health-care workers into the clinics. The escorts have often had to thread their way through throngs of protesters bearing placards and shouting, as Mr. Hill frequently did, "Mommy, Mommy, don't kill me!"

Peace Mission

Mr. Barrett said he saw escorting as an extension of his military service.

"My dad was a military man, and there's a stereotype of the military man, that he's all about war," his daughter, Dandy Barrett Witty, said the other evening as relatives gathered on the back porch of the Barretts' ranch-style house here. "But Dad taught me from the time I could understand that his primary mission was to keep the peace. That's what his feeling was the day he died. That's what he was doing the day he died."

Mr. Barrett himself was very direct about why he chose to serve as an escort. "I've spent my life doing my best for the security of my country and the people who live in it," he told a local newspaper last year. "Why should I stop now?"

Mr. Barrett was in many ways a conservative man, but the question of whether his own thoughts on abortion underwent a transformation is complicated. Even his widow and his children say they are not exactly sure where he stood on the issue.

"My dad may not have been pro-abortion," said his daughter, Ms. Witty, "but he was most assuredly pro a woman's right to choose. He felt very strongly that she had that right, and that she should do it safely and without harassment."

There was evidence that his opinions on other issues grew more liberal over the years. In the 1950's, for instance, when stationed at Ellington Air Force Base in Houston, he was in charge of a review board that examined the sexuality of service members stationed there and discharged many homosexuals.

Four years ago, on his second or third date with June — both were widowed at the time — she had something to tell him.

" 'I just want you to know, Jim,' " she recalled saying, " 'I have a gay son who is H.I.V.-positive. And I want you to meet him.' Well, he accepted that. He got to know my son. He loved my son." The son, Arthur, died in San Francisco last year at the age of 43. Afterward, Mr. Barrett said that he had become deeply bothered by what he had had to do at Ellington.

Mr. Barrett had been much looking forward to a 75th birthday party in his honor, planned for Aug. 9 at the officers club of the Pensacola Naval Air Station. "We are going to celebrate this milestone with a party to beat all parties," read the invitations.

Instead he was eulogized in a memorial service last weekend at the Unitarian Universalist Fellowship here. At the service, there were tributes to his military career, and Theresa Hunter, past president of Escambia chapter of the National Organization for Women, said: "That man had more life in him than most people, regardless of their age. He was just a very vital person."

But the accolade that seemed to strike closest to home came from his son, Bruce, a Pensacola contractor.

"He was real neat guy," he said, as the congregation of 450 broke into applause. "My dad was a neat guy."

7/5/94

THE WASHINGTON POST

On the Road Less Traveled

Black Woman Challenges Status Quo in Bid for Judgeship

By Jon Jeter
Washington Post Staff Writer

When Elvira White, a lawyer in Prince George's County, failed to get nominated for a judgeship two years ago, the county's top black elected officials gathered outside the courthouse and denounced the decision as racist.

By contrast, White's co-workers taunted her with a newspaper article on the decision posted on the office bulletin board, White said.

The two reactions reflect the colliding perceptions of White, who has emerged from the relative obscurity of the state public defender's office to mount a rare political campaign for a seat on the Circuit Court bench. Both damned and deified by the county's legal community, White is the first lawyer in a decade to challenge a sitting judge in Prince George's.

The overwhelming majority of judges in Maryland are first appointed to the bench by the governor and then run for retention, typically unopposed. But after trying for years to get appointed, White decided last year to take the less-traveled route.

White's portrayal of herself as the underdog, a black woman taking on a powerful white status quo, resonates with many blacks, who see the judiciary as one of the last bastions of inequality in the county. Though blacks account for 52 percent of the county's population, only four of the 19 Circuit Court judges are black. All four are men.

"This is 1994, not 1964," White said. "Our courtrooms should reflect that this is a new day in Prince George's County."

White's candidacy also brings into sharper focus the sometimes polarized perceptions of blacks and whites.

"Elvira elicits some very strong feelings in a lot of people," said Dwight Jackson, a county prosecutor, who is black. "Some people's perception is that she is this loudmouthed black woman always stirring up trouble.

"But from an institutional dynamic, what she's doing is challenging the way things are and have been done. It reminds me of Curt Flood," said Jackson, referring to the former professional baseball player who was both maligned and revered for his 1972 Supreme

See WOMAN, B6, Col. 1

WOMAN, From B1

Court case that resulted in free agency in the sport.

White, 42, was once the darling of the county's legal community, a fixture at the parties thrown by the most established lawyers and judges in Prince George's. When she came to the county 15 years ago from the University of Maryland's law school, White was one of a handful of black women practicing law.

She joined the public defender's office, won a promotion to supervisor and handled three capital punishment murder cases, which are typically given to the best lawyers. She was awarded the county bar association's highest award for community service. In 1988, with letters of support from dozens of lawyers and judges, she became the first black woman ever recommended for a judgeship by the Prince George's judicial nominating commission, the panel of lawyers and laypeople that advises the governor on appointments to the bench.

But her once-amicable relationship with the panel turned suddenly sour in 1992, after White's secretary accused her of racism. A letter from the secretary, Ruth Jones, to White describes a conversation between the two women shortly after Los Angeles erupted in violence and flames following the acquittals of four white police officers charged with beating a black motorist, Rodney G. King.

"I have trouble believing that you condone violence," Jones wrote. "Yet today, you sat in my office and said you condone the violence and have no compassion for anyone, including the white truck driver who was beaten for no other reason than he is white."

White denied that she ever endorsed violence of any sort and said that she only expressed empathy for the rioters' apparent frustration. But the letter found its way to the judicial nominating commission, which had twice recommended White's appointment to the bench. This time, however, the commission declined to nominate her.

That led to a courthouse news conference in which the county's top black elected officials protested that the commission had unfairly branded White a racist, based on Jones's unproven allegation. Citing rules of

"They never once mentioned a fee structure," said Barbara Kahlow, vice president of the Foggy Bottom Association. "There at least should have been a hearing."

Patrons complained that, even after paying, they could not use the deep end of the pool, which was closed off last week because there were not enough lifeguards.

Charges may be waived for people

Page 1 of 2

THE NEW YORK TIMES

7/4/94

Fix Minority Contracting

The Dinkins administration vastly overstated the success of its minority contracting program, a recent series of articles in The Times has revealed. Some companies that won contracts by claiming female or minority ownership may actually be owned by men or whites — facts that city officials could have ascertained if they had not been so cavalier in their investigations. Misleading bookkeeping also let the administration make exaggerated claims about the number of contracts going to women and minorities — claims Mr. Dinkins used in his mayoral campaign.

Such flim-flam is hard to avoid in municipal contracting, especially in affirmative-action programs. The reason is basic: money and politics are involved. But the difficulties of creating effective affirmative-action programs is no excuse to give up, as Mayor Rudolph Giuliani has, in effect, done.

The Mayor, who called the Dinkins program "bad social policy" during the mayoral campaign, began dismantling it soon after he took office. He abandoned the Dinkins practice of awarding contracts to qualified minority- or women-owned companies even if they bid up to 10 percent higher than the lowest bidder. Now he has dropped the other key feature of the program — its long-term goal of awarding 20 percent of all city contracts to such companies.

Randy Mastro, Mayor Giuliani's chief of staff, says other steps will be taken to expand dramatically the chances for minority- and women-owned businesses to compete for contracts. These businesses will be carefully certified as minority- or women-owned by the Department of Business Services. They will then be given access to a city computer system listing prospective contracts, enabling them to know about and bid on many more contracts than in the past.

These steps, while useful, are too limited. Absent a stated goal, where is the city's incentive to promote the awarding of contracts to companies owned by women and minorities? Affirmative-action programs, despite the problems that often arise, are proven mechanisms for giving minority groups a chance to enter fields of work previously closed to them.

If the Mayor wanted to design an effective minority contracting program with safeguards against abuse, surely he could. Few are better equipped to do so than Mr. Giuliani, a former Federal prosecutor with strong law-and-order credentials. But Mr. Giuliani remains opposed to the goals and set-asides of many affirmative-action programs. It is disappointing that he chooses to duck a challenge that could no doubt be met if the political will existed to do so.

THE NEW YORK TIMES, MONDAY, JULY 4, 1994

Limits on the Voting Rights Act

THE SUPREME Court has begun to sketch the outer limits of the Voting Rights Act. Last year, in a case that shook the civil rights community, the court ruled that white voters can challenge redistricting plans if the boundaries drawn are so "bizarre" as to be inexplicable on grounds other than race. Two decisions last week did not take that principle another step to ban racially based redistricting entirely. But they did narrow the options of minorities seeking to strengthen their voting power.

The first case was a challenge to a Florida redistricting plan on grounds that the plan did not create as many minority legislative districts as possible. Justice Souter, writing for the majority, emphasized that such a step has never been required by the law. The court ruled that since the number of Hispanic districts created in the Dade County area is roughly proportional to the percentage of voting-age Hispanics there, the plan is perfectly acceptable. To illustrate the absurdity of the plaintiffs' demand in this case, he posited a hypothetical jurisdiction with a population of 1,000, divided 60-40 on racial lines organized into 10 districts of 100 each. By manipulating district lines, it would be possible to create seven minority districts out of 10 (just assign 51 minority voters to each of the seven), a result that would run counter to the law's intention. The decision is sensible.

The second case is more troubling. By a vote of 5 to 4, the court held that the Voting Rights Act does not require a Georgia county whose population is nearly 20 percent black, to move from a single-commissioner government to a five-member board in order to give blacks a stronger voice in the government. While the law could be applied to prohibit a change in the other direction—that is, a multi-member commission being reduced in size in order to shut out blacks—it does not require a change in the status quo like the one requested here. A constitutional challenge can still be brought if the plaintiffs can demonstrate that the single-member form was created to exclude blacks. But that will be a hard case to make since the system was adopted in 1912, at a time when few, if any, black citizens were voting in Georgia. This decision leaves the minority community in Bleckley County without a real remedy for its predicament other than building coalitions with white voters and effecting change through the ballot box.

In both cases, Justices Thomas and Scalia joined in opinions agreeing with the results but setting forth their belief that the Voting Rights Act only reaches discriminatory "standards, practices and procedures," not the dilution of voter strength by manipulation of boundaries. This view runs counter to both legislative history and 25 years of judicial precedent. Congress has the power to change the law if it so chooses. Fortunately, the Thomas-Scalia view will garner little support in the courts, which must read the law as it is written and as it has consistently been interpreted.

choices—American Indian or Alaskan native, Asian or Pacific Islander, black, and white—and two ethnic choices—Hispanic origin or not of Hispanic origin. When a combined format is used, Hispanics are included in the racial categorization, and blacks or whites are modified by the phrase, "not of Hispanic origin."

Absence of a multiracial choice is particularly difficult for school children, who "have to choose one parent and deny the heritage of the other parent" when filling out forms, said Ruth Provost of the Massachusetts Parent-Teacher-Student Association. "Even worse," she said, is when administrators deny children the choice and make their own designations.

Arab-Americans "are not white Europeans," said attorney Louis N. Massery, representing the American-Arab Anti Discrimination Committee. Arabs are distinct from Africans, Asians, or Europeans, he said, proposing that an Arab classification should be based on language and culture. Arab-Americans have faced increased discrimination in the aftermath of the Gulf war and because recent immigrants are more heavily Moslem than earlier immigrants.

"The government can tell you the number of Aleutian Islanders or Eskimos in New York City," but not the number of Arab-Americans in Detroit, he added.

Corrine Mudarri of the American-Arab Institute argued for an even broader "Middle Eastern" racial designation based on geography, which also would include Turkey, Iran, and Afghanistan. About 4 percent to 5 percent of the Massachusetts population is Middle Eastern, she estimated.

Several representatives of a native Hawaiian organization, Ho'Omau, argued that native Hawaiians should be removed from the Asian or Pacific Islander category and added to the American Indian and Alaskan native group. Native Hawaiians already have won such designation under several federal laws, said Manu Aluli Meyer.

White Europeans and German-Americans should have their own designations said Joseph E. Fallon of the National European-American Society, who criticized the "meaninglessness of white as an official category."

Complications Could Arise

But an employer representative cautioned that revising the system could complicate and not necessarily improve affirmative action record-keeping. "We are the folks who have to deal with compliance issues," said Lorence Kessler of the Equal Employment Advisory Council, composed of large employers.

Kessler warned that while adding categories may make individuals more comfortable about themselves "ultimately discrimination is more about how others perceive a person than about how a person perceives himself or herself." Increasing the number of categories also could pose problems when employers are required to request sensitive information from job applicants, he added.

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REP. GEPHARDT SAID LIKELY TO SOFTEN EMPLOYER MANDATES IN HEALTH REFORM BILL

House Majority Leader Richard Gephardt (D-Mo) is likely to propose some type of phase-in or "trigger" of employer mandates in fashioning a compromise health reform bill that can pass the House, according to congressional aides interviewed by BNA.

Sources said the task of compiling a bill for House floor consideration will fall largely to Gephardt, who will consult with key committee chairman over the next few weeks to fashion a politically viable plan. A floor vote is expected to occur before the August congressional recess, scheduled for Aug. 15 through Sept. 6.

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In the specialty apparel chains, The Limited Inc., in Columbus, Ohio, said sales of $631.8 million were 5 percent higher than sales of $604.1 million last June. Comparable store sales, however, were down 4 percent.

The Gap Inc., based in San Francisco, said sales of $308 million were 12 percent higher than sales of $276 million a year ago. Comparable store sales were up a modest 2 percent. The company said its promotional activity this June was less than in June of 1993.

Best Buy Co. Inc., based in Minneapolis, retailer of consumer electronics and major appliances, reported that sales surged 58 percent to $328 million from $207 million last June. Comparable store sales were up a hefty 14 percent.

Gottschalks, a Fresno-based regional department store chain operating in California, Washington, and Oregon, said sales of $31.3 million were 6.8 percent higher than $29.3 million last June. Comparable store sales were up 6.8 percent. The company said this was the ninth month of comparable store sales increases in the past 10 months.

Ross Stores Inc., another California-based chain, said sales of $129 million were 16 percent higher than last June. Comparable store sales were up 7 percent.

Spiegel Inc., of Downers Grove, Ill., said its total sales of $233.3 million were 38 percent higher than last June's $169 million. It provided comparable store figures for its Eddie Bauer subsidiary, where sales were up 12 percent from last June.

50-Off Stores Inc., based in San Antonio, Texas, said sales of $14.2 million were 12.7 percent higher than last June. Comparable store sales rose 10.6 percent.

Ames Department Stores, of Rocky Hill, Conn., said sales of $199.5 million were 3.6 percent higher than last June. Comparable store sales rose 4.7 percent.

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OMB OPENS HEARINGS ON REVISING FEDERAL RACE, ETHNIC CATEGORIES

BOSTON—Federal racial and ethnic designations should be expanded to cover a wider range of categories, witnesses told federal officials here July 7.

At the first of four field hearings on revising race and ethnic standards for federal statistics and administrative reporting, individuals argued that multiracial persons are forced to deny part of their heritage, that the country's large Arab-American population is ignored, and that native Hawaiians are misclassified.

Current standards and categories, formulated 17 years ago as OMB Directive No. 15, are used by federal agencies for civil rights enforcement and collection of population and labor force data.

"During the past few years, the standards have come under increasing criticism," said Sally Katzen, administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget, who chaired the hearing.

"We have heard from individuals who report data about themselves and from various organizations that use the information collected by the federal agencies that the categories have become less useful over time in reflecting the diversity of our nation's population," Katzen said.

Katzen said after the hearing that OMB hopes to have preliminary revisions to the race and ethnic standards available by next year when the Census Bureau begins pretesting for the 2000 census. Future hearings are scheduled on July 11 in Denver, July 14 in San Francisco, and July 18 in Honolulu.

About half of the 14 speakers at the hearing asserted that a new "multi-racial" category should be added to federal forms. Current race and ethnicity standards list four racial

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The Washington Times FRIDAY, JULY 8, 1994

Checkpoints in mostly white suburb draw charges of bias from NAACP

PENNSAUKEN, N.J. (AP) — Police trying to reduce crime in this predominantly white suburb of Camden, New Jersey's poorest city, came under attack yesterday for a plan to make random stops of drivers coming from its urban neighbor.

"They should also check the people going into Camden from Pennsauken," said Roosevelt Nesmith, NAACP coordinator for southern New Jersey. "Criminals travel both ways."

Mr. Nesmith and others said the plan had a racist tinge and would be challenged as unconstitutional if the Pennsauken safety director, Steven Petrillo, goes ahead with it.

Mr. Petrillo said the idea was in response to years of car thefts, burglaries and robberies in neighborhoods bordering Camden, an impoverished city of 87,000 people on the Delaware River across from Philadelphia.

Mr. Petrillo initially proposed checkpoints at announced spots near the border, with every third or fourth car stopped.

"We want to get pro-active in terms of giving residents confidence in security and the safety of their streets and their homes," he said.

Following the criticism, however, Mr. Petrillo said the checkpoints likely would be scaled back to stops of drivers with motor vehicle violations, such as expired car registration or burned-out license plate lights.

He said he had not decided when to put checkpoints into effect. He plans to organize meetings with residents.

"This is just an idea, a concept," he said. "We are open to discussion."

Camden is 56 percent black and 31 percent Hispanic, while Pennsauken, which has a population of about 35,000, is 80 percent white.

Edward Martone, executive director of the New Jersey Chapter of the American Civil Liberties Union, said the proposed stops in Pennsauken do not address a specific need, such as sobriety checkpoints for drunken driving.

"Whether you're pulling over every black person or every Chevrolet, it still means that you're stopping and looking into the cars of innocent people to find the guilty," he said. "Police should not be stopping and searching people without probable cause."

Religious harassment must be addressed in EEOC guidelines

The wire service report in your June 29 paper on the congressional response to the Equal Employment Opportunity Commission's (EEOC) proposed workplace harassment guidelines ("House has bad news for EEOC," Nation) got it all wrong.

First, the House did *not* vote to cut the EEOC's budget. Instead, both supporters and opponents of the guidelines voted to prevent EEOC funds from implementing the guidelines *as originally drafted*. All sides agree that the original draft guidelines must be reworked to provide clarifying language to delineate between illegal harassment and protected expression.

The article also mischaracterized the Senate resolution on this subject. The Senate did *not* call on the EEOC "to drop any reference to religion from the guidelines." In fact, the Senate rejected an earlier version of this resolution that called on the EEOC to drop religion entirely. As. Sen. Howard Metzenbaum, a co-sponsor of the unanimously approved amendment, clarified in a letter to the chair of the EEOC, this Senate resolution merely calls for the temporary removal of the category of religion, and makes clear that religion need not be excluded from the EEOC's final guidelines.

Far from creating a "religion-free" workplace, these guidelines will enhance protection for religious freedom by reiterating that religious discrimination in the workplace is prohibited and reaffirming that religious expression which is not harassing is protected.

The Anti-Defamation League and a broad coalition of civil rights and religious groups believe that religion *must* be included in the final version of the EEOC's workplace harassment guidelines to make clear that religious harassment in the workplace is illegal and that the problem is worthy of serious attention by the federal government.

JESS N. HORDES
Washington Representative

LESLEY ISRAEL
Chair
Washington Affairs Committee
Anti-Defamation League
of B'nai B'rith
Washington

THE NEW YORK TIMES FRIDAY, JULY 8, 1994

Federal Government Is Rethinking Its System of Racial Classification

By STEVEN A. HOLMES
Special to The New York Times

BOSTON, July 7 — Teja Arboleda's maternal grandparents are European. His father's mother is African-American. His father's father is the product of a marriage between a Filipino and a Chinese.

Although listed as white on his birth certificate, Mr. Arboleda refused to state his ethnic or racial identity on the 1990 census form. And so an employee of the Census Bureau noted his name, olive-toned skin and dark hair, and marked him down as Hispanic.

"So I was born legally white," Mr. Arboleda told Federal officials at a public hearing here. "Now I'm legally Hispanic. If I ever run for office, the media would hunt me down and splash newspapers with headlines that read, 'Arboleda, candidate, falsified his race.'"

Mr. Arboleda's experiences, though far from the norm, represent a growing problem for Federal agencies that collect and disseminate data describing contemporary American society: With an increasingly diverse population and with ethnic and racial pride on the rise, how do people describe themselves?

As the number of ethnic groups continues to grow in the United States, there is a sense that "the current terms are less useful in expressing and depicting the diversity of our nation's population," said Sally Katzen, administrator of the Office of Information and Regulatory Affairs in the Office of Management and the Budget. The budget agency, which is reviewing Federal racial and ethnic classifications, is charged with setting policy on the gathering of statistics for use by other Federal agencies.

More Than Statistics

The public hearing here today, the first of four to be conducted around the country, could result in the first expansion in the number of racial and ethnic categories recognized by the Federal Government since 1977.

And what seems like a minor adjustment in Federal regulations could become a bramble bush of problems. Budget office officials say that any change in the number or type of racial and ethnic classifications would affect only the gathering of data for statistical purposes; changes in how those statistics are used would require changes in law.

Some groups fear — and others hope — that such alterations would presage changes in allocations of Federal aid that is based on race or ethnicity. On the other hand, some businesses worry that changes in categories would make it more difficult for them to abide by Federal anti-discrimination laws.

Budget office officials say no changes will take place without thorough research, and probably not before 1997. That would still allow time for Congress to review any proposed changes that might affect the census for the year 2000.

Currently, Federal agencies like the Census Bureau, the Department of Education and the Justice Department ask people to choose from four racial categories: white, black, Asian-Pacific Islander and American Indian-Alaskan native. People who feel they do not fit into any of the categories are supposed to list themselves as "other."

In addition to the four racial categories, Federal forms ask people whether they are Hispanic.

But witnesses here, particularly those of mixed parentage, and several organizations contend they are slighted by the categories.

"If I am coerced into categorizing myself as only one of the races or ethnicities provided in legal forms or applications, I can only comply dishonestly and immorally, unless I am given the option of multiracial," Mr. Arboleda said.

Many feel the categories now in use do not allow for diversity.

Officials expect complaints like those of Mr. Arboleda to grow in the coming years as the number of interracial marriages rises. The number of interracial unions increased from 0.4 percent of all marriages in 1960 to 2.2 percent in 1992.

Concerned Arab-Americans

Arab-Americans also say they are unhappy with their designation. Currently, people whose recent ancestry stems from a region west of Pakistan and encompassing the Middle East, North Africa and Turkey are listed as "white, non-European."

"I don't know what that means," Jim Zogby, president of the Arab-American Institute, said in a telephone interview. "But somehow the Federal Government has come up with a common basis for a group that includes Egyptians, Sudanese, Iranians and Norwegians."

Manu Aluli Meyer, who represents a group called Ho'omau, which means "persevere" in Hawaiian, testified that she would like to see native Hawaiians moved from the Asian-Pacific Islander classification to the American Indian category. Mostly, she said, it is a matter of ethnic pride and historical accuracy. But she acknowledged a more practical reason.

"Some colleges and the Department of Education have minority scholarships that you get through your status as a Native American," she said.

Possible Classifications

To accommodate some of the complaints, the budget office is considering several changes in the racial and ethnic categories, including the addition of "multiracial" and "Middle Easterner" classifications. It is also contemplating a new "Hawaiian Islander" classification, or shifting that group from the category of Asian-Pacific Islander to Native American.

In addition, the Government is considering changing Hispanic from an ethnic designation to a racial one, since so many people say they view being Hispanic as a separate race.

Although such changes might satisfy some groups, they could create problems. In the past, for instance, black organizations like the National Urban League have discouraged the notion of a mixed race category, fearing it might reduce the number of blacks tallied in the census.

Moreover, some experts wonder how the multiracial classification would be defined. Would it be people whose parents are of different races, or would it be the grandparents? Would the category be limited to the children of unions between white and black or white and Asian, or could it include children of Japanese-American and a Vietnamese-American parents?

Nampeo McKinney, assistant division chief for special population statistics at the Census Bureau, observed, "This can be a can of worms."

P.S. Original article — Print was not clear.

JURY TRIAL AVAILABLE UNDER REHAB ACT
WHEN PLAINTIFF SEEKS 'LEGAL' REMEDIES

A federal district court erred by denying a jury trial to a woman who claimed that she was fired in violation of the Rehabilitation Act of 1973 and sought back pay as part of the remedy, the U.S. Court of Appeals for the Eleventh Circuit ruled (*Waldrop v. Southern Company Services Inc.*, CA 11, No. 93-6230, 6/29/94).

Reinstating a disability discrimination claim filed by Barbara S. Waldrop, the appeals court said that under the Seventh Amendment, Rehabilitation Act claims are subject to jury trials if a plaintiff seeks "legal" relief for the alleged discrimination. The court said that in this case, the back pay sought by Waldrop falls into the category of legal rather than equitable relief, and it ordered a jury trial on her claim against Southern Company Services Inc.

After being laid off by Southern, Waldrop sued the company in March 1991 under both the Age Discrimination in Employment Act and the Rehabilitation Act, seeking a "make-whole" order that Southern reinstate her with back pay and liquidated damages, in addition to lost seniority, pension rights, and other fringe benefits. She petitioned for a jury trial on all her claims.

The district court, however, held that Waldrop was entitled to a jury trial only on her ADEA claim. After a jury ruled against Waldrop on her age discrimination claim, the court rejected her disability discrimination claim. On appeal, Waldrop argued that the district court erred by refusing her a jury trial on the Rehabilitation Act claim.

Seventh Amendment Analysis

Writing for the Eleventh Circuit, Judge Frank M. Johnson Jr. said that since Section 504 of the Rehabilitation Act provides no guidance on the availability of a jury trial in a private action, the court must look to the Seventh Amendment to determine if a jury trial is required.

The Seventh Amendment preserves the right to jury trial in "suits at common law, where the value in controversy shall exceed twenty dollars." As interpreted by the U.S. Supreme Court, a jury trial is available in all suits where legal rights are involved, whether at common law or under federal legislation. The court's two-pronged test considers whether the statutory action is comparable to a legal action in 18th-century England, and whether the remedy sought is legal or equitable in nature.

"[A]lthough there were no discrimination actions at common law, §504's remedies appear comparable to actions brought before courts of law in 18th-century England," the Eleventh Circuit found. The court explained that discrimination claims under the Rehabilitation Act may be compared to common law tort actions or actions for breach of employment contracts.

"Regardless, even if this first factor does not persuasively militate for a jury trial, the second prong convinces us that Waldrop deserved a jury trial on her §504 claim," the court decided.

The court found that compensatory damages, a form of legal relief, are available for violations of the Rehabilitation Act, relying on a 1992 Supreme Court decision that such damages can be recovered under Title IX of the Education Amendments of 1972 (*Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028).

"The similarities between Title IX and §504 require the same finding in cases, such as this one, pursuant to the Rehabilitation Act," the court said. "Thus, suits under §504 provide to plaintiffs the full spectrum of remedies, such that in appropriate §504 cases, the Seventh Amendment allows a jury trial."

Back Pay Called 'Legal' Remedy

The essential issue in the case, the court said, is whether Waldrop's request for back wages constituted legal or equitable relief.

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Carlos Guerra

'English-only' really just is code for hate

One African-American bus rider found it ironic that it was Jan. 17 — Martin Luther King Day — that a Greyhound bus driver on a trip from Lake Tahoe to San Francisco ordered the passengers to stop speaking Spanish.

"This is a new twist on an old problem," Michelle Jones told the San Francisco Examiner. "Now, it's not 'no coloreds on the bus. It's English-only.' "

What I find ironic is that intolerance to the speaking of languages other than English — and especially to Spanish — is growing in the United States at the same time many U.S. corporations are actively encouraging their top executives to learn other languages — *especially Spanish* — to make their firms globally competitive.

In this California nightmare, five of the bus riders who were harassed and intimidated by the driver for speaking Spanish and two other passengers who argued with the driver about his treatment of the Spanish-speakers are suing Greyhound in a San Francisco Superior Court for humiliation, fear of physical assault, emotional assault and violation of civil rights.

Ana Menjivar, who represents the plaintiffs, charges that the driver ordered passengers — on the loudspeaker, no less — to stop speaking Spanish because they were "giving him a headache." Then, "he pulled the bus over . . . to make his point."

The suit also alleges that the driver deliberately shut the bus door on the arm of one Spanish-speaking woman at a rest stop.

Liz Dunn, spokeswoman for Dallas-based Greyhound said the company agreed that its driver was wrong to berate the passengers for their linguistic transgressions. He was disciplined, Dunn told the Associated Press, and the passengers were offered "a settlement."

Citing company policies, she refused to discuss details.

Menjivar identified the driver as J.M. Vaughn, and explained that a Greyhound supervisor to whom the offended passengers complained did offer each of them a $25 travel voucher, and this offer was repeated in a letter from the bus company's legal department.

Unlike many, I am not surprised that these complaints elicited such little sympathy.

A column about a similar case involving the speaking of Spanish in the work place brought numerous calls, almost all of them negative and almost all from readers who reminded me, as one man put it, that "this is America and people should speak American," meaning, I suppose, English.

Those who speak languages other than English, almost all of the callers said, should "go back to Mexico."

One reader even thought that "speaking English should be mandatory in this country . . . (and required) to get a driver's license, welfare forms, or whatever . . .

"(T)his is the United States of America," he blustered in conclusion, "not the United States of Mexico, or Japan, or England."

England?

He paused after catching his faux pas and explained: "Which does not really speak good English."

Actually, most citizens or noncitizen residents agree that knowing English is important here, primarily because they realize that many Americans do not speak any language other than English.

Something tells me, however, that beneath all the posturing about "the language of America" and talk of doom "if we don't have a language we all understand" is something far uglier than the need for an exclusive lingua franca, or common language. A lot of it is really coded racism.

And those who doubt this contention might try to recall the last time they heard anyone say: "If those people don't want to speak English, they should go back to Germany."

Or France, or Poland or the Czech Republic.

To leave a message for Carlos Guerra, call ExpressLine at 554-0500 and punch 4410.

THE NEW YORK TIMES

THURSDAY, JULY 7, 1994

Panel Urges Police Training to Help Ease Racial Tension

TRENTON, July 6 (AP) — New Jersey's advisory panel to the United States Commission on Civil Rights issued a report today calling for better training and greater accountability in police officers' dealings with minorities.

"The public is often angered by allegations that police officers use excessive or fatal force and are not held accountable for their actions," said Zulima V. Farber, a member of the advisory committee.

The report followed the 1990 shooting of a black teen-ager by a Teaneck police officer.

Hearings on police practices were held in 1991 but the report was not released until today because of delays, dissent and staff changes, panel members said. Although the testimony is old, the report's recommendations are still relevant, Ms. Farber said.

While there is a perception in many communities that the problem is "pervasive," there are few statistics to back those assertions, she said.

Correct or not, a perception of police hostility to minorities is called 'pervasive.'

The report recommends that the state keep a record of bias complaints against police offers by requiring local departments to file monthly reports with the state police. An annual report, outlining how complaints were handled, should also be issued, the report says.

The report also says the state should take the following actions:

¶Require all police actions that result in death or serious bodily injury be investigated by a grand jury.

¶Require counties to form committees to investigate and screen bias complaints.

¶Encourage local police departments to seek residents' views on the quality of service and professional conduct of their officers. For example, a questionnaire could be attached to any traffic citation regarding an officer's conduct and demeanor.

¶Encourage local departments to improve recruitment of officers from all major ethnic groups in the communities they serve.

¶Improve the policies for screening police officer candidates. If patterns of misconduct become evident, the officer should be trained further or dismissed.

No Obligation to Act

The report is only an advisory report. The state Attorney General and lawmakers are under no obligation to enact any of the recommendations.

Gov. Christine Todd Whitman said that Attorney General Deborah T. Poritz was reviewing its findings.

"Some of what is recommended is already taking place," Ms. Whitman said, "but there are some new ideas that need to be evaluated and I would certainly leave it to her as the chief law enforcement officer of the state to respond to that."

Ms. Poritz would not comment on the report's specific recommendations, but said in a statement that she would discuss the findings with the advisory committee.

In 1992, a state task force recommended psychological screening of recruits, mandatory in-service training for police officers and standardized public reporting of confrontations between civilians and the police.

"I know some of the recommendations have been made before, but they are worth repeating," said Irene Hill-Smith, chairwoman of the New Jersey advisory committee. "Somehow they never get implemented."

The Washington Times ★ THURSDAY, JULY 7, 1994

The government ponders ways of counting by race

By Deroy Murdock

It's been 30 years since the Civil Rights Act of 1964 and 131 since Abraham Lincoln signed the Emancipation Proclamation. Yet the noble objective of a color-blind, merit-based American society still seems ages away.

President Clinton's Office of Management and Budget (OMB) may be shoving this elusive goal even further into the future. Today, OMB is launching a series of public hearings on "Race and Ethnic Standards for Federal Statistics and Administrative Reporting." These meetings, scheduled for Boston, Denver and San Francisco, will weigh proposals to create finely-tuned racial classifications "reflecting the diversity of the nation's population," according to an OMB announcement.

The OMB and the House Census Subcommittee have heard ethnic activists argue that the usual black, white, Hispanic, Asian and American Indian categories are too broadly-drawn. The parents of some mixed children are calling for a new "multiracial" rubric to reflect the ethnic make-up of the estimated one million kids of biracial marriages. The Arab-American Institute wants a Middle Eastern box available on the next Census. There are Latinos who wish to slice the Hispanic label six ways. Even some Hawaiians are torn between calling themselves "native Americans" and "Pacific Islanders." Their solution? A new "native Hawaiian" designation.

Where might such racial hair-splitting end? Can it be long before white folks march into competing camps of Anglos and Saxons?

Deciding who fits into such new categories could put government into a business chillingly akin to eugenics. As OMB Administrator Sally Katzen blandly observes in the Federal Register: "The issue of self-identification of race and ethnicity versus third party identification also has been raised." Are government ethnicity inspectors — armed with eye-color charts and DNA testing gear — beyond imagination?

If the White House caves into pressure to classify Americans as if they were species at the zoo, it will accelerate a dangerous trend. The core democratic value of equality before the law is being undermined by myriad schemes of racial favoritism that replace consensus and amity with ethnic rivalry and tension. Ideas such as those before the OMB could lead to a Kigali on the Potomac.

For instance, racially gerrymandered legislative districts, often shaped like swatted spiders, cobble together minority voters in disparate communities to give black and Hispanic candidates virtual pre-paid tickets to Congress. Some civil rights activists already fret that counting light-skinned and dark-skinned blacks separately could require the re-mapping of legislative constituencies.

The Federal Communications Commission offers extremely attractive terms for minority-owned companies that bid on licenses to provide services such as wireless telephone communications. These firms, and those owned by women, are offered 25 percent "bidding credits" that would, for instance, allow them to pay just $750,000 on a successful $1 million auction bid. White guys need not apply for this special favor.

The Clinton health plan couldn't resist a dip in the preference pond. The ClintonCare proposal calls for the creation of the National Council of Graduate Medical Education. It would assign students to medical school specialties (such as neurology or cardiology) based on the extent to which their ethnic groups are "underrepresented in the field of medicine generally and in the various medical specialties."

Meanwhile, Americans of Asian descent have charged that public universities have tried to limit the admission of highly qualified students from that group lest they be overrepresented.

Such racial bean-counting already boosts costs and headaches for American industry. Many firms that work with public agencies must keep records on the ethnic composition of their staffs. These tasks only will grow more bothersome and expensive if companies must plug their workers into a profusion of new racial pigeonholes. "If my figures show I need multiracial engineers," Lorence Kessler of the Equal Employment Advisory Council wondered recently in Business Week, "where do I go to get them?"

The only legitimate reason for government to distinguish one American from another racially is when authorities describe identifying features while seeking a fugitive or missing person. This exception aside, the public use of ethnic formulas, goals and timetables is little more than state-sponsored racism.

Although Dr. Martin Luther King Jr. proclaimed it proudly in his "I Have a Dream" speech at the Lincoln Memorial in Washington, the notion of a color-blind society today seems as foreign as the Taj Mahal. In fact, this idea is as American as the change in your pocket. As those nickels and dimes say: "E Pluribus Unum."

As America turns 218-years-old this week, it's as important as ever that the U.S.A. dedicate itself to the ethics of equality and individual rights and responsibilities. The American Tower of Babel, which some are demanding of the OMB, would do profound violence to these sacred principles. The federal government should go in the opposite direction by leading public agencies in ignoring its citizens' flesh tones, eye colors and the coarseness of their hair. From the White House, to the state house to city hall, Americans should be treated as Americans. Period.

Today, OMB is launching a series of public hearings on "Race and Ethnic Standards for Federal Statistics and Administrative Reporting."

Deroy Murdock is a New York writer and president of Loud & Clear Communications, a marketing and media consultancy.

Our nation's gain

The D.C. chapter of the Women Marines Association recently sent a letter to first lady Hillary Rodham Clinton noting her recent lamentations about how the Marine Corps in 1975 refused to enlist her because of her gender. Local lady leathernecks, in the letter signed by chapter President Helen H. Peters, rush to comfort the wounded first lady.

"Dear Mrs. Clinton," the note reads. "The Women Marines Association, District of Columbia (D.C.-1) Chapter, regrets the circumstances that prevented you from joining the Marine Corps in 1975. It is obvious that you were destined to be of service to our country. We concede with pride the fact that the Marine Corps' loss has become our nation's gain."

(For the benefit of other military women who may have missed follow-ups in this newspaper and The Washington Post, it was reported that the would-be Pvt. Rodham may have been doing what came naturally to feminist faculty of the University of Arkansas — just conducting private "tests" to prove that equal opportunity promised to women was not a reality.

(Ann Henry, an old Rodham friend, was quoted as saying that Hillary's application to the Marines to prove she would be rejected "would have been consistent with what was going on with us at the time.")

"[Vernon] has presented no evidence at all to suggest that the challenged government action will be ongoing and continuous," said Judge Hubert L. Will. "While we by no means endorse 'witch hunts,' serious charges—even if thinly documented—against police officers regarding their on-duty performance must be investigated."

The court held that Vernon has failed to demonstrate any substantial burdening of his religious rights. Judges Betty B. Fletcher and Dorothy W. Nelson joined in the opinion.

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SUPERVISORS' EXCLUSION FROM COLLECTIVE BARGAINING, CONTINGENT WORKFORCE, FOCUS OF NEXT DUNLOP HEARING

The issue of whether managers and supervisors should continue to be excluded from the scope of some labor laws protection in the United States and the effect that exclusion has on managers' relations with employees will be among the topics a Clinton administration commission will examine July 25 during a meeting at the Labor Department, the commission announced July 7.

The next meeting of the Commission on the Future of Worker-Management Relations also will focus on issues related to the "dividing line between employee and individual contractor," otherwise known as "contingent workers" who likewise fall through the cracks when it comes to some workplace protections and benefits provided under current employment and labor laws, according to a notice scheduled for publication in the July 7 *Federal Register*.

The meeting is the first of a series the commission has scheduled as part of its work to develop recommendations for improving workplace productivity and competitiveness through greater worker-management cooperation. The meetings will follow up on issues raised by the commission's interim "fact-finding" report, released last month (105 DLR AA-1, 6/3/94).

More meetings are slated for August and September to discuss issues such as employee participation and alternative forms of dispute resolution, as indicated in an earlier announcement from the commission (120 DLR A-2, 6/24/94). The second phase of hearings is intended to help the commission craft recommendations, due within six months.

Appropriate Coverage

The 10-member panel—known as the Dunlop Commission after its chairman, former Labor Secretary John T. Dunlop—will use the July 25 meeting to delve into the "appropriate coverage" of labor relations and employment law with respect to managers, supervisors, and salaried employees. This statutory exclusion rests on the assumption that employers need the undivided loyalty of management in representing shareholder interests in situations where conflicts of the workforce arise, the report noted. To forge a "more cooperative conception" of the employer-employee relationship may mean changing labor laws so that "representation does not necessarily imply the existence of an adversarial relationship," the commission said in its report, thus prompting a review of whether supervisors or middle managers should continue to be denied the right to union representation or collective bargaining.

The commission wants input on what, if any, changes should be made in the scope of the managerial exclusion set out in the National Labor Relations Act.

On the contingent work force issue, the commission noted that many public and private employers have subcontracted work to businesses that rely on part-time workers at lower benefits and wage rates than those paid to full-time workers. For example, the report estimated that some 7 million part-timers work fewer than 1,000 hours per year and are thus are not eligible for benefits specified in the Employee Retirement Income Security Act and the Family and Medical Leave Act.

The committee wants discussion on whether the definition of "employee" should be changed to bring under NLRA protections those workers who are labeled contractors but who

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BNA's Daily Reporter System

DAILY LABOR REPORT

CURRENT DEVELOPMENTS

INVESTIGATION INTO RELIGIOUS BELIEFS HELD LINKED TO ON-DUTY PERFORMANCE

The U.S. Court of Appeals for the Ninth Circuit has rejected federal and state religious liberty claims raised by former assistant chief of police Robert Vernon of the Los Angeles Police Department stemming from an investigation of his ties to the Grace Community Church of Sun Valley, Calif. (*Vernon v. City of Los Angeles*, CA 9, No. 92-55473, 6/23/94).

Members of the city council demanded an investigation following a May 1991 article in *Los Angeles Magazine* detailing Vernon's involvement in the church where he has served as an elder since 1984. Citing a series of audiotapes Vernon had made for the church some 15 years earlier, the magazine painted a portrait of Vernon as intolerant of homosexuality, depicting cops as "ministers of God," and instructing women to be submissive.

Vernon claimed that the article misrepresented his sincerely held beliefs, but at a city council meeting, he was quoted as declaring that God wanted him to be police chief. Others apparently described him as a "Bible thumper" and the department as the "God squad."

A city councilman accused Vernon of manipulating test scores to reward fellow church members, of implementing a policy of no arrests at antiabortion demonstrations, and of thwarting promotions of gay, lesbian, and female officers. He also claimed Vernon pressured LAPD officers to attend religious meetings at his church and at department headquarters and that he used Christian symbols, such as a fish, on official department correspondence.

The subsequent investigation included the promotions, hiring, and treatment of gays, lesbians, and women, and whether church elders were consulted on matters of police policy.

Civil Rights Suit Filed

Vernon filed suit in federal court under the Civil Rights Act of 1871 seeking injunctive relief. He claimed that the investigation chilled the exercise of his religion in violation of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Vernon alleged that between May 5, 1991, and the time the complaint was filed, some 33 articles appeared in newspapers and journals. He claimed that he suffered extreme embarrassment, anxiety, and fear in the pursuit of his religious, personal, and professional affairs. He also alleged that he was inhibited or retarded in the exercise of his religious beliefs, including worship, consultation with his pastor, participation in Christian fellowship, and giving public testimony to his faith. He claimed that the notoriety hurt his career because he was not reappointed to the Peace Office Standards and Training Commission.

The court held that the investigation had a valid secular purpose—to determine whether Vernon's religious views were affecting his job performance in such a way as to violate police department policies and regulations or the civil and constitutional rights of both police officers and citizens. The court also found that the investigation was aimed at determining whether Vernon's on-duty conduct violated the Establishment Clause.

The court stressed that the investigation was not directed against the Grace Community Church and at most touched the church through the inquiry into whether Vernon consulted with church elders on matters of police policy.

The court found that the investigation was restricted to his on-duty conduct and that it resulted in no disciplinary action being taken, so that he has failed to show any concrete and demonstrable injury.

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NAACP at Crossroads In Civil Rights Struggle

Group Faces Criticism as Convention Opens

By Edward Walsh
Washington Post Staff Writer

CHICAGO, July 10—Less than a month after it hosted a controversial summit conference of African American leaders in Baltimore, the NAACP began a critical national convention here today amid an internal debate over the future direction of the nation's oldest and largest civil rights organization.

At the center of that debate is the NAACP's executive director, Benjamin F. Chavis Jr., whose attempts to revitalize an organization that has been criticized by some as a stodgy bastion of the middle class, out of touch with young, inner-city blacks, has stirred dissension within and concern among outside groups historically aligned with the NAACP.

Chavis, 46, the NAACP's youngest executive director, was the driving force behind the Baltimore summit, which brought together leaders from a broad spectrum of African American organizations, including Nation of Islam leader Louis Farrakhan. But in reaching out to Farrakhan, Chavis has drawn fire from critics who fear that he is attempting to engineer a radical break with the NAACP's traditional role as a moderate, mainstream civil rights organization that has been in the forefront of the legal and political struggles over segregation and inequality.

At a news conference today before the convention's first general session, Chavis predicted "a reaffirmation of the direction we're going. There's not going to be any ambiguity about where we're going."

Chavis said the NAACP had not changed its historic civil rights mission but was "redefining and broadening the definition of civil rights." He said he invited Farrakhan to the Baltimore summit because he and the Nation of Islam "are a critical component of the African American community" and to ignore him would have run counter to the NAACP's objective of broadening its appeal in the black community.

William F. Gibson, chairman of the NAACP's 64-member board of directors and a Chavis ally, said the organization is at a crossroads and must shift its focus to "the fundamental survival questions that many people do not consider civil rights, but it is—because the right to live, the right to raise a family and have a decent home is fundamentally an American civil right."

Asked about a recent Newsweek magazine article that was highly critical of Chavis's leadership, Gibson said outsiders had no right to tell the organization who it should choose as executive director. "Frankly, we don't give a damn about what you think," he said.

Chavis also defended his role as the chairman of a lobbying group that is seeking changes in the Superfund law that governs the cleanup of toxic waste sites. The group, the Alliance for a Superfund Action Partnership, is funded in part by business and industry contributors who are seeking the elimination of financial liability for toxic waste dumping before 1986.

Chavis, who has charged that blacks are the victims of "environmental racism" because so many toxic waste dump sites are near black residential areas, said little progress has been made in cleaning up the sites because of costly legal battles over liability. By eliminating "retroactive liability" as an issue, he said the alliance hoped to speed the cleanup of the sites.

His critics, Chavis added, "attempt to take a swipe at me because I am pulling the cover off the bogus implementation of the current Superfund legislation."

Earlier, as an estimated 40,000 convention participants began to gather here over the weekend, Chavis and other NAACP leaders referred to divisions within the organization and the larger black community as they appealed for unity.

Chavis said the convention is taking place as black Americans face "some critical life-and-death issues," including crime, black-on-black violence, drugs, teenage pregnancy and school dropouts.

He said there were "a few naysayers" to his policies and added: "We can turn our people around, but it requires us to embrace each other and lift each other up."

"We are hoping to come forward with unity, hoping that we can bring ourselves together," Gibson said. "Unless we address the issue of division, of fighting among ourselves, this convention will not be successful. We must deal with reasonableness, not rancor."

Thomas Turner, the convention manager and an official of the Michigan AFL-CIO, said Chavis's recent actions have caused concern in organized labor, a traditional ally of the NAACP. Turner said he planned to convey those concerns to Chavis during the convention but did not share them himself.

"It's very hard to judge his effectiveness or lack thereof, but I think that Ben Chavis is on a proper course as it relates to this organization," Turner said.

Indirectly responding to the criticism of Chavis's overtures to Farrakhan, he added, "When people tell us who we should meet with or not meet with, that causes us a lot of concern."

Chavis arrived here Wednesday, and one of his first acts was to meet with local Jewish leaders, who later said they were pleased with the chance to exchange opinions with the NAACP leader. Farrakhan, whose pronouncements have been condemned as antisemitic by Jewish leaders, lives in Chicago but has no scheduled public role in the convention. Asked today whether he planned to meet with Farrakhan here, Chavis said, "possibly."

THE WASHINGTON POST MONDAY, JULY 11, 1994

PHOTOCOPY
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G-7's Signal: Inflation Ahead

By David Malpass

If you thought the administration's policy on Haiti was confused, look at the message on the dollar coming out of last Friday's Group of Seven meeting in Naples. It signals inflation ahead, a loss to American living standards, and a red flag for world financial markets.

The coordinated message from the G-7 meeting was to tolerate dollar weakness and go for short-term growth. President Clinton said that "it is important not to overreact" to the dollar's weakness. He stated his fundamental objective, "to pursue global growth." Treasury Secretary Lloyd Bentsen invoked the Brady doctrine by stating the administration position that the "independent" Fed doesn't need to raise interest rates now. This means it's all right for the Fed to print more dollars even though it printed massively in 1993 and the dollar is weak against gold and the yen. To Japan, the message was that it should add money printing to its program to stimulate the over-taxed economy. Damn the inflation torpedos, full speed ahead.

The message on the dollar converted the meeting from a yawner into an eye-opener. Deja vu 1978. At that time the dollar had been weakening against gold since mid-1976 with only a muted response from the Fed. Sharp inflation set in, leading to the 1980-82 recession.

Mr. Bentsen did repeat his welcome plea of last month for a stronger dollar, but it sounded hollow in context. Based on the "go-for-growth" G-7 message, it looks like Mr. Bentsen may want the dollar to strengthen by having the yen and mark move down against the dollar and gold. In this interpretation, the dollar could "strengthen" toward the inauguration level of 125 yen, but it would still take more than $380 to buy an ounce of gold. If this "strong dollar" policy of weakening the yen against gold is implemented, the financial result will be to move investors from Japanese bonds into commodities, not into the dollar. Japan gets higher long-term interest rates; the world gets inflation.

Besides, apart from Mr. Bentsen, the Clinton administration may prefer a weak dollar, both on economic and trade policy grounds. Influential advisers to the administration still argue stridently that a weak dollar is not inflationary (hogwash), will help the trade deficit (contrary to recorded history) and, after all, is consistent with Republican policy since 1985 (faint praise). As long as the administration sticks to its view that the U.S. trade deficit is a major, actionable failure of U.S. economic policy, Mr. Bentsen's strong-dollar statement carries little weight.

So the G-7 message is clear enough. The administration wants growth above all. It would be happy if Japan or Germany printed more money to help stimulate their economies, weaken their currencies, and give the impression of a stronger dollar. The trade war with Japan is still on.

The risks from a tolerant policy on dollar weakness are immense. Gradualist increases in short-term interest rates will not be enough to induce investors to risk currency losses by investing in a weakening dollar. The U.S. derives massive benefit from the world's acceptance of the dollar as the international currency. If today's dollar policy is halfhearted, countries that are now part of a dollar trading zone will have to reconsider the inflationary consequences of their linkage.

Throughout Southeast Asia, countries that depend on the dollar as their currency anchor (Thailand, Hong Kong, China, Malaysia, etc.) will get tired of running higher interest rates than their Japanese trading partners. Argentina has said that it will jump to a stronger monetary anchor if the U.S. dollar becomes an unreliable one. Russians and Brazilians, who now depend on the dollar to protect themselves from inflation, have ignored the dollar's 17% loss against gold since Mr. Clinton's inauguration. At some point, they will get fed up and shift to a better store of value.

Already, investment managers in Europe are beginning to express a preference for mark-denominated assets over dollar-denominated ones. British Columbia issued yen-denominated bonds last week, finding Japan's low long-term interest rates an attractive source of capital. A weak dollar can quickly become a disfavored dollar, with enormous negative consequences on the world financial system.

Financial markets would move instantaneously in the desired direction (lower long-term interest rates, stronger dollar) if the administration truly reversed its weak-dollar policy. It would have to make clear that the dollar should strengthen in absolute terms—vs. the yen as well as gold and commodities—and that the shift in absolute value is permanent. One sentence would suffice: "President Clinton expects to be able to buy an ounce of gold for $350 in November 1996, and all through his second term." By defining "strong dollar" in such absolute terms, the president would force clarity into an otherwise mushy administration policy, breaking the spell that is drawing policy makers further and further into the mistakes of the late 1970s.

Such an approach would quell the market's concern that the administration is soft on inflation or is pushing the Fed toward a weaker dollar. It would guarantee lower long-term interest rates, mortgage rates and inflation, as well as more jobs and growth. Any whiff of true long-term dollar strength, rather than a weaker mark and yen, would bring investors rushing back to dollar assets, lowering long-term rates and salvaging the economic expansion.

Mr. Malpass is director for international economics at Bear, Stearns.

THE WALL STREET JOURNAL MONDAY, JULY 11, 1994

The Black Crime Gap

By John J. DiIulio Jr.

The poverty gap between blacks and whites may be shrinking, but the crime gap is growing. No group of Americans is more devastated by crime than black inner-city citizens and their children. No wonder black urban residents overwhelmingly cite crime as the single biggest problem in their neighborhoods.

In 1992, the violent-crime victimization rate for blacks was the highest ever recorded. Some 113 out of 1,000 black teenage males were victims of violent crimes. This compared with 94 for black teenage females, 90 for white teenage males, and 55 for white teenage females. The rate was 80 for young (age 20-34) black men, compared with 52 for young white men. And the rate was 35 for adult (age 35-64) black males vs. 18 for adult white males. The chances that a black male teenager would be victimized by violent crime were 6.2 times that of a white adult male, 7.5 times that of a white adult female, 18.8 times that of an elderly white male and 37.6 times that of an elderly white female.

Black residents of cities are most at risk. From 1987 to 1989, the average rate of violent-crime victimization among city residents was 92% higher than among rural residents, and 56% higher than among suburban residents. In 1992 the rate at which black males in central cities experienced violent crimes was 2.5 times the rate at which nonmetropolitan white males experienced them. Even within central-city populations, the rate at which black males experienced violent crimes was 53% higher than the rate for white males (up from 31% higher in 1989).

Criminal Data

Now let's look at the data about those who commit crimes.

Statistics show that the vast majority of violent crime is intraracial. About 84% of violent crimes committed by blacks are committed against blacks, while 73% of violent crimes committed by whites are committed against whites.

In 1991 black youths were arrested for weapons-law violations at a rate triple that of white youths. In the same year, the violent-crime arrest rate for black youths was five times higher than that of white youths (1,456 vs. 283 per 100,000). From 1976 to 1991, the murder rate among white youths was stable at two to three per 100,000. Between 1976 and 1986 the murder rate for black youths fluctuated between around seven and 10, then rose steadily to about 14 in 1988, 18 in 1990 and 20 in 1991.

The tragedy of thousands of black youths killed by black youths might be expected to concentrate hearts and minds on the question of how to stop the violence. Instead, this national tragedy has been trivialized by those who spout errant nonsense about racial disparities in the justice system.

The tragedy of thousands of black youths killed by black youths has been trivialized by those who spout nonsense about racial disparities in the justice system.

In fact, once one controls for such characteristics as the offender's criminal history or whether an eyewitness to the crime was present, racial disparities melt away. To cite a typical example, a 1991 study of adult robbery and burglary defendants in 14 large urban jurisdictions found that a defendant's race or ethnic group bore almost no relation to conviction rates or other key outcome measures.

In 1980, 46.6% of state prisoners and 34.4% of federal prisoners were black. As the prison population increased during the 1980s, the percentage of blacks changed little. By 1990, 48.9% of state prisoners and 31.4% of federal prisoners were black. Compared with white prisoners of the same age, black prisoners are more likely to have committed crimes of violence. In 1988 the median time served in confinement by violent offenders was 24 months for whites vs. 25 months for blacks. For crimes of violence, the mean sentence for whites was 110 months vs. 116 months for blacks, while the mean time in confinement differed by only four months (33 months for whites vs. 37 months for blacks).

At the federal level, a 1993 study showed that the imposition from 1986 to 1990 of stiffer penalties for drug offenders, especially crack cocaine traffickers, did not result in racially disparate sentences. The amount of the drug sold, the offenders' prior criminal records, whether weapons were involved, and other characteristics that federal law and sentencing guidelines establish as valid considerations accounted for all the observed variation in sentencing.

In short, the best available evidence indicates that race is not a significant variable in determining whether a criminal is arrested, sentenced to probation or prison, or given a long or short term.

Of course, American justice is not yet fully color-blind. But rather than celebrate our progress in approximating this ideal, some prefer to focus attention on whatever evidence of racial disparities they can muster.

For example, there are hundreds of post-1969 studies of minorities in the juvenile justice system. Barely two dozen.

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Fed Times
8/22

Minority Firings Studied

Focus Groups Blame Bias

By Leigh Rivenbark
Federal Times Staff Writer

Blatant bias, undertrained supervisors and misunderstandings among different races and generations are to blame for the fact that minority employees are fired at a rate three times higher than whites, according to employee focus groups.

The Office of Personnel Management set up the groups after statistics came to light last year showing that minority workers, on average, were fired at a rate of 10.2 per 1,000 while white workers were fired at a rate of 3.7 per 1,000.

Focus group participants said they believe the disparity in firings of minorities and whites will shrink when more minorities and women hold supervisory and managerial jobs.

But for now, agencies continue to choose people as supervisors based only on their technical skills, not on their leadership or communication abilities, participants said.

The focus group members were 104 managers, supervisors, employee relations specialists, labor relations specialists and union representatives in 15 cities.

OPM chose employees from those groups because it sought people who had been involved in disciplinary actions, said Rosalie Cameron, OPM spokeswoman.

Though OPM unveiled the study's results at a recent Blacks in Government conference, that organization was not completely satisfied with OPM's focus groups.

"We're not rejecting the use of the focus group, we're just not terribly comfortable with it," said Frank Hunt, spokesman for BIG.

The group would like OPM to talk with people who were fired to get their side of the story, Hunt said.

The statistics that sparked the study show disparities in the firing rates for minorities and whites.

There are 605,000 minority employees among the government's 2,175,000 non-postal workers.

OPM's statistics for fiscal 1992 show that while whites were fired at a rate of 3.7 per 1,000 employees, blacks were fired at a rate of 12.7 per 1,000; American Indians' rate was 12 per 1,000; Hispanics, 6.6 per 1,000, and Asian and Pacific Islanders, 3.8 per 1,000.

'Minority employees may find it harder to communicate with non-minority supervisors.'

Focus Group Report

Focus group participants placed much of the blame for the disparities on supervisors, who are seldom held accountable for their actions, participants said.

One person mentioned a manager who received a "prestigious agency award" despite several unresolved equal employment opportunity complaints saying he was the discriminating official.

Top-level management also came in for criticism for sending wrong signals to supervisors, as when a division director at an agency allegedly said in public, 'it's just too black here."

Some responses were common among all the groups, including, "supervisors do not communicate and relate as well with subordinates who are not like themselves, and most supervisors are non-minorities."

Supervisors pursue discipline more aggressively with minority employees and do not counsel them when the problem is correctable, the report said.

"Minority employees may find it harder to communicate about problems they are having or help they need with non-minority supervisors," the focus groups found.

More firings also take place in lower grades.

In grades GS-1 through GS-5, the firing rate is 16.7 per 1,000 for minority employees and 8 per 1,000 for whites. At GS-11 through GS-15 the rates drop to 2.1 per 1,000 for minorities and 1.4 per 1,000 for whites.

Many participants said they believe the most disciplined employees are younger ones who understand less about workplace expectations and have different work ethics from older workers. Participants also said many problems are associated with new hires who are on probation.

"A number expressed the opinion that a high percentage of discharges and other disciplinary actions are based on substance abuse related misconduct," the report said.

Participants also said minorities seem less likely to seek representation when they are faced with discipline and less likely to fight.

Minority employees also receive less mentoring, participants said.

Staff Cuts Hurting Diversity, Critics Say

By Christy Harris
Federal Times Staff Writer

The Clinton administration's commitment to reduce the size of government could interfere with its aim of ensuring the work force looks like America.

No single agency is tracking government streamlining to ensure it doesn't hurt diversity efforts, according to Eugene Kinlow, deputy assistant HHS secretary for personnel administration and deputy director of equal employment opportunity.

Kinlow spoke Aug. 3 at a Blacks in Government conference in Washington, D.C.

Kinlow said reducing the federal work force by 272,000 people by 1999, as required by law, could decrease the representation of blacks and other minorities.

Most agencies are cutting their work forces through attrition and buyouts, but some have had to resort to reductions in force.

"The first thing we ought to try to agree to is let's take RIFs off the table," Kinlow said. "Let's try to be more humane."

Some agencies, such as the Veterans Affairs Department, and some programs within agencies, are exempt from the cuts. That makes it harder on agencies which must absorb more than their share of cuts as a result, Kinlow said.

Managers must acknowledge reductions have the potential to erode gains in minority representation, and take steps to stop it, Kinlow said.

Agencies could get rid of more employees or positions than necessary in order to hire back minorities, Kinlow said.

For example, if an agency must reduce its rolls by 100, it could cut 150 positions and hire 50 people to ensure diversity, Kinlow said.

James Moone, special assistant to the director of National Institutes of Health, said layoffs and buyouts are eroding affirmative action initiatives.

Buyouts hurt black employees' chances of climbing into the higher ranks of government, Moone said.

Many senior black employees are retiring with cash incentives, but there are not enough blacks in the "pipeline" to take their places, Moone said.

"We are losing top-rate black employees, high-graded employees that had to struggle up," he said. "We don't go up the pipeline too easily.

"We've seen a flood of black, high-graded employees go out the door, but there is nobody to replace them that looks like them," Moone said.

Kinlow said many agencies, including HHS, are in "soft" hiring

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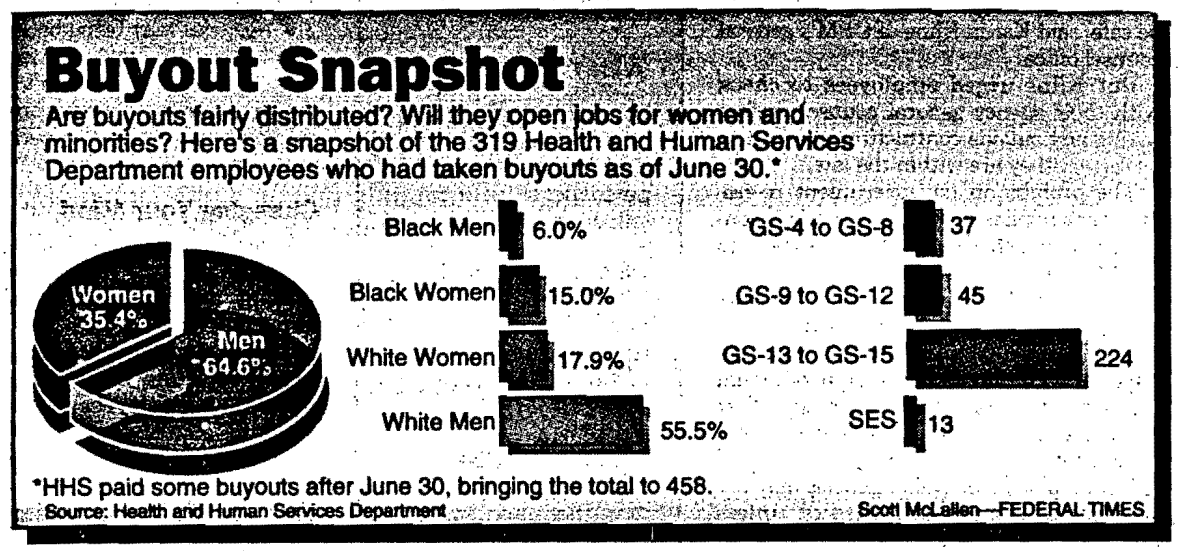

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freezes, bringing on few, if any, new workers. Because agencies generally aren't filling higher graded jobs, blacks in GS-12 and GS-13 jobs can't move up, he said.

Nick Nolan, executive director of the Federal Government Service Task Force, cited a Congressional Budget Office study that found women and minorities don't necessarily face a greater risk of layoffs, but that RIFs hurt morale. The study found agencies are concerned about the effects work force reductions will have on minorities, he said.

In some earlier RIFs, blacks and women were disproportionately affected, Nolan said. But others have been conducted fairly, he said.

More than 3,500 employees from across the country attended the Blacks in Government conference. BIG is a national organization of federal, state and local employees. With about 170 chapters, BIG provides training, counseling, networking and other support.

BIG sent Vice President Al Gore a list of concerns about National Performance Review recommendations. The Work Force Restructuring Act stemmed from the National Performance Review.

The group called for decentralizing authority for hiring, recruitment and promotions, giving agencies more flexibility.

"We strongly believe that this move could result in relaxing safeguards that now exist to assure equal opportunity in a diverse work force," according to the statement.

"Without more specific procedures aimed at strengthening the EEO process, we fear that the National Performance Review plan runs a risk of diluting EEO enforcement, rather than improving it."

Fed. Times

Voicing Doubts About Women OK

A federal court reversed the demotion of a foreman accused of not carrying out his agency's nondiscrimination policy.

Kelvin Holland was a warehouse worker foreman at Tinker AFB, Okla. In 1989 one of his subordinates filed a discrimination complaint against Holland, and an investigation ensued.

"It was found, and Holland does not dispute, that between 1984 and 1988, on a number of occasions, he made statements to his subordinates and to potential employees that he believed that women in general were incapable of performing work in the [warehouse] and that he would never hire a woman,'" the court's decision said.

The Air Force proposed demoting Holland from foreman to aircraft freight loader, the decision said. The notice of his proposed demotion alleged "failure to comply with management policies regarding equal employment opportunity."

Holland appealed to the Merit Systems Protection Board.

The Air Force dropped two charges that Holland had discriminated, and told an MSPB judge it was relying on Holland's statements to support the demotion, the decision said.

The MSPB judge and the full board upheld the demotion.

But a federal court said there is no evidence Holland ever discriminated in a personnel decision.

Holland made statements "expressing beliefs regarding conduct which, if taken, would likely violate EEO regulations and statute." But such statements are not illegal, the court said.

Kelvin Holland vs. Air Force, 93-3300, July 20, 1994, Federal Circuit Court of Appeals.

FBI Getting Tough On Sex Harassment

FBI supervisors who sexually harass their employees will probably be fired, under a tough new anti-harassment policy unveiled by FBI Director Louis Freeh.

Freeh's Aug. 10 announcement came in the wake of a sexual harassment lawsuit filed in March by two women agents against their supervisor in the bureau's Santa Ana, Calif., office.

Freeh said the FBI had settled the case in May and the supervisor was disciplined, though he did not give details of that discipline.

An FBI spokesman said the bureau would not comment on the nature of the discipline.

"While the punishment was commensurate with the most severe discipline imposed in other comparable cases, future punishment guidelines will be even more harsh," Freeh said.

Firing is the "likely disciplinary result" in future cases where a supervisor harasses a subordinate, according to an FBI statement.

Freeh also encouraged employees to use the equal employment opportunity process.

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DAILY LABOR REPORT

CURRENT DEVELOPMENTS

ABSENTEEISM DUE TO MIGRAINE HEADACHES MAY FALL UNDER DISABILITIES ACT, COURT HOLDS

A federal judge in Kansas City, Kan., has refused to dismiss the Americans with Disabilities Act claim of an employee who was fired due to absences related to migraine headaches (*Dutton v. Johnson County Board of County Commissioners*, DC Kan, No. 93-2184-GTV, 7/20/94).

Judge G. T. Van Bebber observed that the employer offered various alternate schedules, but concluded that the evidence does not show that the schedules would be a reasonable accommodation because the plaintiff's cycle of migraines was unpredictable.

The employer argued that the headaches do not substantially limit any major life activities, because they occur relatively infrequently, and the plaintiff missed on average less than 10 work days per year. "Plaintiff's status as a disabled individual is a highly fact-sensitive issue requiring an individualized inquiry and case-by-case determination," the court said.

William R. Dutton had worked for the Johnson County Public Works Department from October 1979 until August 1992. He held jobs as a laborer, truck driver, and equipment operator. The latter job, which he held for five years, involved the operation of bull dozers and dump trucks and other equipment used in road maintenance.

Dutton claimed that he began experiencing migraine headaches in 1971 while still in the military and that his headaches have not changed significantly in quantity or quality since then. The triggering mechanisms are unknown.

From 1979 to 1989, Dutton took roughly 100 hours per year in sick leave. In November 1989, the director of Public Works issued a new policy requiring that vacation time be scheduled in advance. If sick leave usage exceeded a certain amount, the employee was required to provide a doctor's statement. The policy provided that vacation or personal holidays for which the employee gave inadequate notice would be treated as unscheduled leave and that such incidents could adversely affect an employee's appraisal rating.

Supervisors now routinely require at least three days notice of any use of vacation time. Dutton received his first reprimand for absenteeism in 1989. He then supplied a note from his physician revealing his treatment since 1983 for severe headaches.

In 1991, Dutton was denied permission to use vacation time to cover absences due to illness when he had exhausted sick leave. Beginning in May, he was forced to take leave without pay. His next annual appraisal marked him "provisional" for attendance and punctuality. He was given a three-month period to improve his attendance and was then denied a salary increase.

In a deposition, a supervisor testified that at times, Dutton's absences left crews idle and disrupted work schedules. He reasoned that although Dutton was not essential, his absences required the scheduling of someone else to perform his work.

Van Bebber concluded that the migraine headaches are a physiological disorder affecting the neurological and cardiovascular systems. He found the evidence sufficient to crease a genuine issue of material fact as to whether the impairment limits one or more of his major life activities.

"When he suffers a headache, plaintiff is unable to drive or carry on most normal, everyday tasks that an unimpaired individual is able to do," Van Bebber said. "[His] limitation on major life activities includes that of working."

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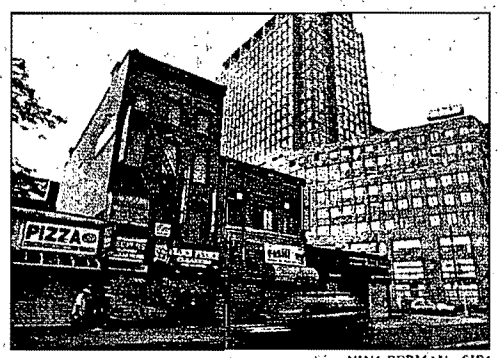
A Tale of Two Cities

The problem isn't the absence of jobs, but the culture of poverty

BY JOE KLEIN

HUGH PRICE'S SOLEMN, HONORABLE INAUGURAL speech as president of the Urban League has been celebrated as a rare moment of rationality in the nation's never-ending, ever-depressing racial debate. Price has been raised up as a reasonable alternative to the charlatans who crowd the scene, especially the NAACP's divisive and disingenuous Benjamin Chavis—and rightly so. He told some uncomfortable truths on July 24 in Indianapolis: he said there was no future in separatism. He said that white racism, though "well documented and undeniable," was "somewhat less pervasive now" and not the sole cause of black despair. He encouraged parents to behave responsibly toward their children, and the middle class to become more involved in the lives of the poor. But he also placed much of the blame for the desperate poverty in urban neighborhoods on the absence of jobs; he lamented the departure of manufacturing work to the suburbs and to other countries; he called for a government program to replace the jobs lost.

These are not new ideas. Price's remedies have been an article of faith among well-intentioned liberals since the publication of William Julius Wilson's "The Truly Disadvantaged." Oversimplified—a temptation Price resisted—the argument becomes: if only black children had better schools and "role models," and if only there were "good" jobs to replace the manufacturing work lost, blighted urban neighborhoods would bloom anew. Unfortunately, reality suggests otherwise.



NINA BERMAN—SIPA

Urban divide: *The contrasts are striking*

On one side glittering towers. Across the street, the Fort Greene projects.

There is, for example, the Fort Greene neighborhood in Brooklyn, N.Y., which seems—at first glance—the very sort of place Hugh Price longs for. Fort Greene is booming, sort of. Over the past four years, more than 16,000 jobs arrived in the neighborhood with Metrotech, a $1.25 billion office complex (a classic "enterprise zone," subsidized by generous tax breaks); there is a busy retail district, with lots of entry-level jobs. There is also a solid, stable—and active—black middle class. None of which seems to have had *any* impact on the local underclass, especially those living in public-housing projects. Fort Greene has New York's highest infant-mortality rate (more than twice the national average) and a glut of the usual cataclysmic social indicators—AIDS cases, welfare dependency, crime and, of course, out-of-wedlock births to teenagers. The contrasts are striking, and disheartening. "You can stand in the middle of Flatbush Avenue and see a tale of two cities," says Eric Blackwell, publisher of the Fort Greene News. "On the one side, the glittering towers of Metrotech. Across the street, the projects, drug dens and numbers holes."

In the projects, the arrival of Metrotech was about as popular (and noteworthy) as the longtime presence of the black middle class: "There's a lot of resentment," says Blackwell. "We got thrown a long, slow curve with Metrotech. Maybe 40 people got hired from the neighborhood." As for the black middle class: "They have their own [public] schools, their own churches. They're like foreigners."

Blackwell exaggerates . . . but only a little. Much of the construction work at Metrotech went to locals, but most of the *permanent* jobs were filled by employees the companies brought with them. Even if they hadn't been—even if Metrotech offered old-fashioned manufacturing rather than Wall Street back-office work—it's not likely that many new hires would have come from the Fort Greene projects. "The people there are so isolated from the world of work, they don't know how to go about finding jobs," says Jan Rosenberg, a Long Island University sociologist. "Proximity doesn't count for much in hiring."

Word of mouth: Indeed, Rosenberg and Philip Kasinitz (of Williams College) studied a nearby Brooklyn neighborhood—Red Hook—which still has plenty of manufacturing jobs, and found that hiring preference is *referential*, as opposed to residential (or racial, for that matter): it's done by word of mouth. Friends of employees get first crack. Residents of the local projects are assumed unreliable. If you don't know anyone who works, you're not likely to find work.

The problem in the Fort Greene projects isn't the absence of jobs. It's the culture of poverty. It's the pattern of dependent, irresponsible, antisocial behavior that has its roots in the perverse incentives of the welfare system, and the legacy of white racism, and the general, societal obsession with sex, materialism and violence and—yes—the departure of manufacturing jobs as well. It is complex and virulent; it has proved intractable. Rosenberg and Kasinitz believe government can fund programs that create the networks (and teach poor people the work habits) they'll need to plug into the world of work—and that may help some. The companies that have moved into Metrotech are offering scholarships and internships, getting involved in the local schools. Hugh Price wants to mobilize the middle class, provide after-school "mentors." All this may help. But mentors are not parents; and the absence of responsible parents, especially fathers, is the phenomenon at the heart of underclass poverty. "I recently went to a focus group for children in the Fort Greene projects," Rosenberg says. "Nine of the 12 didn't live with *either* parent."

Hugh Price has made a start. His message overwhelms the despicable blather that has passed for leadership in the recent past. It doesn't reinforce hopelessness by suggesting that white racism is insurmountable—that no progress has, or can be, made. But it doesn't quite face the problem squarely, either: this isn't a poverty that will be cured merely by jobs or with surrogates. The children of the cities need parents.

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Editorials

ATTACK THE INCOME GAP AT ITS SOURCE

Growing income inequality in the U.S. is an unfortunate legacy of the tumultuous '80s and '90s. Thanks to a vast array of economic, social, and cultural changes—ranging from the decline of good-paying unskilled jobs to the growth in single-parent families to changes in immigration patterns—the gap between rich and poor is the widest since the Census Bureau started keeping such statistics in 1947 (page 78).

The income gap has widened in the face of a boom in American jobs. In Europe, the impact of global competition and technological change has been blunted by heavy taxation, government redistribution, and mandated high minimum wages. The result? Less income inequality but more unemployment. The U.S. has chosen more flexible labor markets with lower unemployment but greater inequality.

The widening income gap has economists worrying that it may be hurting growth. They argue that inequality hurts productivity by slowing educational achievement. Lower-income kids drop out of high school three times as often as higher-income children, and only 4% graduate from college, compared to 76% from the ranks of those in the top quarter of income.

What's to be done? The nation already spends more on public education than Japan or Europe, but that doesn't mean the money is well spent. Only reform that makes classrooms exciting arenas for learning can work. And only parental involvement in homework and character-building can boost the abilities, self-esteem, and grades of children.

Government policies that bolster the family can also help reduce inequality. The high school dropout rate for white 12th-graders in single-parent families is 50% higher than for all 12th-graders. These single-parent families earn 40% less than two-parent families. Serious enforcement of child-support laws would shift $80 billion into single-parent families. Economic incentives for families staying together should be strengthened as well. Higher tax exemptions for children would help two-parent families. So would ending the marriage tax penalty.

The growing inequality has many sources. The means to reverse the trend are available. But is the will?

AIRWAVE AUCTIONS WORK. NOT ALL AUCTIONS DO

After decades of handing out virtually free licenses for the nation's airwaves, the federal government has wised up and started charging. The recent auctions of licenses for paging and interactive television raised an unexpected $833 million, and an auction for personal communications services could net over $10 billion (page 34).

Airwave auctions are doubly good: They ensure that the value of a slice of the spectrum is captured by the public rather than the winner at a hearing or lottery. They also speed wireless services to the public by putting licenses directly into the hands of the companies that intend to use them.

Market mechanisms such as auctions won't work everywhere. Auctions, however, should be the rule for all future assignments of airwaves, including any new broadcasting spectrum. Broadcasters and sympathetic politicians want to retain the system of assigning free licenses to insiders and others with political clout. They argue that choice should not be sullied by financial considerations. That is absurd: People "buy" broadcast licenses by purchasing radio and TV stations.

The situation is more complex for tangible resources. Auctions work fine for oil drilling rights, of course. But market mechanisms have been less successful for rights to emit sulfur dioxide, a cause of acid rain. Here, the government allows polluting companies to trade credits. One problem: People downwind are not happy when an owner chooses to buy pollution credits rather than invest in a cleanup.

Entrenched interests also make it hard to reallocate fishing, grazing, and lumbering rights. Still, market mechanisms could help. They can hardly do worse than the current systems in which the extractors pay little for their rights.

Market mechanisms such as auctions won't fix every problem in allocating economic rights that derive from government. But they certainly deserve a prominent place in every policymaker's toolbox.

YOU'RE UP, BASEBALL OWNERS

As Yogi Berra didn't say, "It's *déjà vu* all over again." With baseball owners and players set to shut down the game for the eighth time in as many labor negotiations, the temptation is to say: A pox on both your houses. Yet the owners bear the burden of explanation for the central issue of the dispute.

The problem, of course, is money. Large-market teams such as the New York Yankees and Los Angeles Dodgers rake in tens of millions of dollars from local TV and radio broadcasts. The owners argue that this gives them a leg up in buying the best talent against small-market clubs such as Minnesota and Cleveland. Their solution: a uniform cap on the teams' salary pool, making players more affordable for the less well-endowed clubs (page 26).

The players, not surprisingly, disagree and prefer to continue to let the market set their salaries. They argue that there's another answer. The league, they say, currently pools its national TV revenue and shares it. Why not put all the local money into the pot and divide that up, too—the way the National Football League does? That would generate enough funds for all the teams to buy high-priced talent.

Large-market club owners, of course, hate this idea. But it would solve most of the disparity problem, and it would be fairer than asking players to pony up for the financial problems of a half-dozen team owners. The league is a business that depends on the health of 28 clubs to mount a game the public wants to see. If a few units of this business have difficulties, it's up to the league, not its employees, to solve it.

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THE NEW YORK TIMES TUESDAY, AUGUST 2, 1994

In Selma, Everything and Nothing Changed

By PETER APPLEBOME
Special to The New York Times

SELMA, Ala. — Bob Mants came to the Alabama Black Belt to work for civil rights in 1965 and still has a cattle-prod scar in his back to remind him of "Bloody Sunday," the attack on civil rights marchers here that evoked the worst of the dying empire of Jim Crow.

Mr. Mants is still here working as director of a hand-to-mouth economic development agency, trying to bring jobs to desperately poor Lowndes County. But his dream that he would witness an old order steadily giving

New South and Old

Third of four articles.

way to a new and better one died long ago.

"I thought back then, if there was any place I wanted to raise my kids, it would be here, because they could see black people moving forward, advancing ourselves as a race," said Mr. Mants, 51, who on that fateful Sunday stood second in line behind John Lewis, now a United States Representative from Georgia, as mounted sheriff's deputies attacked and sprayed tear gas on marchers advocating voting rights. "I was naïve. People may even be poorer now than when I came here in 1965. The progress hasn't taken place."

No one can say the old Alabama cotton country is the same place it was during the 1960's, when civil rights workers — blacks like Jimmie Lee Jackson and whites like the Rev.

Continued on Page B6, Column 1

99 BATTERY PLACE HAS BEEN LIBERATED from the cable monopoly! Better building-wide service. Better prices. Call Liberty Cable 212/891-7777—Advt.

James Reeb and Viola Liuzzo — were killed trying to get blacks the right to vote; when the Black Panther Party was formed in Lowndes County, and when Bloody Sunday and the Selma-to-Montgomery march led to the Voting Rights Act of 1965.

Today, in a region where they were long denied the right to vote, blacks hold as much political power as any other place in America, controlling most of the local and county governments in this southwest corner of the state.

But instead of a place transformed, the Black Belt, so named for the color of its soil, not the bulk of its population, is a reminder that though the civil rights movement ended one world, it did not create another.

The schools here are generally still segregated, with the old white public schools virtually all black and the whites — working class as well as wealthy — in private academies. The racial violence of the past is largely gone, replaced by a flood of drug-related, black-on-black crime that dwarfs the violence of Jim Crow. The civil rights leaders of the 1960's are now the entrenched political class, but the state-mandated tax code still protects the interests of the white landowners who preceded them. The median family income of $18,349 is about half the national average and $10,000 below the state average, in a state that is one of the poorest.

Perhaps worst of all, it is a place where blacks and whites, like punch-drunk boxers, are still fighting the same old battles of race.

"If the swords had been laid down long ago, things could have progressed further," said James E. Ware, who is black and who now heads the Dallas County welfare department in Selma. "Here we are the cradle of the civil rights movement, the mecca of the Voting Rights Act. You'd think that with all the sacrifices that were made and the lives lost, we could have found a way to capitalize on it. What saddens me most is that we've never done that."

The Economy

Stark Poverty And Tax Breaks

The rich black humus of the Black Belt was built up over millions of years from the remains of the limey shells of tiny organisms in what was once a shallow marine sea.

The black soil begat cotton, and cotton begat a flourishing economy based on slavery. And just as millions of years of geologic history determined the Black Belt's economic destiny, the economics of the past have shaped the identity of the Black Belt today, a place that is 66 percent black and one of the poorest parts of the United States.

With its enduring landscape of white-columned antebellum houses and weathered shotgun shacks, its elaborate social ritual of cordiality masking dense layers of turmoil, the Black Belt defines the South of William Faulkner, where the past is inseparable from the present, where the dead still walk, and where everything has changed and nothing has.

The past is alive in the ledger dating to 1928, proudly displayed in the rickety, frozen-in-time Old Beechwood Grocery near Hayneville, with its rolling pine floors, dusty canned foods and a 1937 Chevy and a 1940 Packard rusting outside. It is alive in the 19th-century portraits of the founders of the J. B. Hain Company, a cotton and agricultural firm that operates from the back of the Old Sardis Store south of Selma. It is alive in the countless Old South and Civil War and civil rights and Bloody Sunday observances with which blacks and whites celebrate their separate histories.

And mostly it is alive because, for all the sacrifice and triumph of the civil rights era nothing touched the economic structure that continued to give whites control of the land, the jobs and the capital as well as the tax system that revolves around them.

"When the civil rights movement ended, institutional building didn't begin," said Rose Sanders, who is black and a prominent civil rights lawyer in Selma. "People were so elated to have a victory, to have a President say, 'We Shall Overcome' and sign the Voting Rights Act, that many people thought the battle was over. That was our critical mistake. Now there are less institutions, particularly economic institutions, that meet the needs of black people than there were 30 years ago."

The statistics are dismal. Though the South led the nation in population growth in the 1980's, the 10 Black Belt counties saw their population fall by 13 percent, to 187,994, with a net migration out of 29,052 people.

More than half the blacks live in poverty, led by Wilcox County, where the black poverty rate is 60 percent. Only 10 percent of Wilcox County's whites live in poverty. In Lowndes County 5.8 percent of whites live in poverty and 50 percent of blacks do. In Selma, home to most of the Black Belt's wealth, median household income for whites is $25,580. For blacks it is $9,615.

Selma, with a city population of 24,000 and a metropolitan area of 31,000, lost one of its economic underpinnings in 1978 when Craig Air Force Base closed, taking 2,400 jobs with it. The agricultural economy that supported many small black and white farmers during the civil rights era has collapsed, leaving the industry to big agricultural and timber interests.

PHOTOCOPY PRESERVATION

Page 1 of 3

IN SELMA, EVERYTHING AND . . .

THE NEW YORK TIME 8/2/94

"I made loans 30 years ago of $100 secured by a mule, a wagon and a plow to put in a crop," said Richard P. Morthland, who is white and the chairman of the People's Bank and Trust Company of Selma. "Since then, the whole system of sharecropping has fallen to pieces. Thirty years ago, a farmer who had $100,000 in his equipment was a major investor. Today, you couldn't buy one cotton picker for $100,000."

Other than the jobs no one wants, like those at the nation's largest toxic-waste dump, in Emelle, about 100 miles northwest of Selma, almost none of the industrial plums that the South has won in recent years have come to the Black Belt, the Mississippi Delta or any of the other largely black areas of the rural South.

"A lot of these corporate representatives or folks in economic development will tell you that corporations are reluctant to locate in places where the black population is 35 percent or more," Mr. Mants said.

The Races

Resegregating The Schools

In the spring of 1990, just as Selma was preparing to commemorate the 25th anniversary of Bloody Sunday, something eerie happened.

Amid torrents of rain, the Alabama River crested at its highest level in 100 years. Elmwood, the city's oldest cemetery, was flooded, sending coffins bobbing to the surface.

It summed up a year's worth of turmoil that showed once again that racial division here has not died.

First came a battle between blacks and whites over who would control the commemoration of Bloody Sunday. Next came a showdown over Selma's first black school superintendent, whose contract was not renewed by the school board in a vote along racial lines. After that came a boycott and takeover of the schools by blacks led by Mrs. Sanders and her law firm. Schools were shut down for a week amid threats that blacks would shut down the city as well.

In the ultimate role reversal, the National Guard was called in to protect minority — that is, white — students and keep the peace. When the unrest was over, Selma was on the way to resegregating its schools. Selma High School, where 411 of the 1,200 students were white in 1989, now has only a handful of whites, most of them orphans from the city's Methodist Children's Home who have no alternative.

Mrs. Sanders argues that the boycott was needed to end the education policy of tracking, in which blacks were routinely steered to the slower classes, leaving the accelerated ones for whites.

"The same people that were told 100 years ago that they couldn't build businesses, that they were inferior, have an educational system that reinforces the same thing today," she said.

To climb out of poverty, blacks depend on some of the worst schools in the nation. Testimony in a landmark school-equity lawsuit last year described Black Belt schools as having sewage leaking onto playgrounds, library books infested with termites, fire ants roaming the concrete floors and tables supported by milk crates.

In the city of Selma, and nearly all of the surrounding counties, public schools are virtually all black, particularly once students get to high school. The one exception is in Dallas County, outside Selma, where there is still a fair degree of integration in schools that are 75 percent black. Indeed, in many of the small cities of the South, where the black population is not as dominant as it is in Selma, the city schools are largely black and most whites go to the county schools, which are usually controlled by whites.

In Alabama, the problems of poverty are compounded by a state tax code that leaves most of the wealth base off the tax rolls, making the black electoral gains in the Black Belt a hollow victory.

The tax code is a result of legislation passed in 1972 and affirmed in 1978 and 1982 giving extraordinary tax breaks to landowners; in the Black Belt that means the white owners of the timber and farm land. The legislation pegged the value of farm and forest land at an arbitrary value set in 1982 and said that value could not be increased. As a result, an acre of timberland that is taxed at $3.93 to the east, in Georgia, and more than $4 to the west, in Mississippi, is taxed at only $1 in Alabama.

"It doesn't matter what color gets elected at the city or county level," said Keith Ward, an Auburn University political scientist and an expert on Alabama's tax policies. "They have no authority to make the tax burden any more equitable than it now is."

Many blacks and whites say the problems also reflect the reality that more than improving education, black control of the schools has simply shifted the flow of patronage jobs, to blacks from whites, in an area where local government jobs are often the only jobs.

"Blacks didn't have a problem with the model of political power," said Wayne Flynt, a white professor at Auburn University professor who has led the state's efforts to overhaul education, often finding himself on the side opposite from educators in poor black areas. "Their only problem was that it was whites who were in control of handing out the jobs. We've gone from patronizing, condescending, self-serving white rule to patronizing, condescending, self-serving black rule."

Blacks do not have to go back 100 years to find reasons to be suspicious. In the mid-1980's, an extensive Federal investigation of allegations of voter fraud in the Black Belt produced indictments of eight black elected officials. The prosecutions resulted in only one felony conviction, which was later overturned and one plea bargain for a guilty plea on a misdemeanor charge. Many black politicians were left convinced that whites would do anything to roll back black gains.

But though most people believe that tracking was an issue, there is much dispute about how pervasive it was. And even many who think tracking was a problem say the boycott was so divisive that it all but killed community support for the public schools.

Whites, many of whom had worked to build and maintain the interracial makeup of the public schools, were embittered. The resentment only deepened over time among working-class whites, who pay taxes to public schools they believe they cannot use and then pay for private schools they believe they cannot afford. Many believe that the real agenda of the boycott was to recreate a world that guaranteed black valedictorians, black homecoming queens and black class presidents — a return to segregation, only this time with the public resources going to blacks.

"My kids went to school with black kids, they made their first communion with black kids, they competed in school with black kids, and to me that was a wonderful thing," said Alston Fitts, who is white and who works for the Edmundite Missions, a Roman Catholic organization that does health and education work in the Black Belt. "The greatest disappointment to me was how much of that was swept away by the debacle. I remember my friends telling me, in great distress, that their children were now more racist than their parents had ever been, not out of ignorance but out of bitter experience that they were generalizing and making absolute."

Even many blacks believe that the boycott was a disaster for the schools and for Selma.

"It was almost like an attempt to relive the 1960's that caused a lot more harm than good," Mr. Ware said. "Now whites have pretty much conceded the public school system to the blacks. But if you don't have

PHOTOCOPY PRESERVATION

THE NEW YORK TIMES 8/2/94

IN SELMA Everything and...

Down the Road

Murky Issues Seem Daunting

Just five years ago, Selma recorded four murders. Last year it had 16, most involving young blacks killing one another. So far this year there have been five, but no one sees that slower pace as a sign of a big downturn in drugs and violence among black youths.

"We had two young black children murdered like dogs this week, only you don't kill animals the way we're killing children," Mrs. Sanders, the civil rights lawyer, said in April. "We never had crime like this in Selma. Now it's impossible to find a community in the rural South that does not have a crack house."

Unlike the morally clear goals of the civil rights era, the issues in Selma today — crime, drugs, jobs and education — are as murky and daunting as they are everywhere else. And though the politics here invariably break down along racial lines, the views of ordinary people on how to address those issues often do not.

Almost as many blacks as whites are quick to bring up welfare when they talk about why the revolution of the 1960's produced such mixed results.

"Whosoever wrote the welfare bill knew exactly how to mess up a race of folk," said the Rev. Fairro J. Brown, the black pastor of the Selmont Community Baptist Church in Selma.

He sees the shortage of jobs as Selma's biggest problem, but then says that jobs alone are not the answer — that what is also needed is a fundamental improvement in the black family.

"Most of these fellows would rather be working than to be in jail," Mr. Brown said. "Unless he's extraordinarily sorry. You know some people are so sorry they wouldn't work if you got them a job in a factory eating holes out of doughnuts."

Even among many veterans of the civil rights movement, there is a sense that the new black politicians are, well, politicians, not the exemplars of virtue they could appear to be when contrasted with the evils of segregation.

"Now that they have gotten a chance to be in office, they are doing some of the same things the white ones are doing," said Sarah Logan, a retired black teacher, who was dismissed in the 1960's for joining the civil rights movement in Lowndes County. "Just like the white people, they have their own little ring, their own friends to take care of."

Yet there are people here who are still trying to make things work. There are groups like One Selma, made up of 30 black and white professionals and business people who gather at a meeting room at a local hospital every Tuesday morning for earnest conversation about bridging the divide. There are Afro-centric cultural programs for black youths, run by Mrs. Sanders, that have won national praise.

People genuinely want to move forward. But in an area that is poor and black, where the glistening new South of corporate relocations and shopping malls seems as distant as Jupiter, people just don't know how.

At the time of Bloody Sunday, Selma's Mayor was a young segregationist named Joe Smitherman.

Today, Mr. Smitherman, still Mayor, sits in his office chain smoking amid a clutter of connections to the old days — 30 years of civic proclamations and photos, a shotgun leaning against a wall, old cigar boxes, an antique cash register, a Bear Bryant houndstooth hat.

Mr. Smitherman, who has skillfully slid toward the political center over the years, says this will probably be his last term. But he does not see Selma's inevitable election of a black mayor, either when he steps down or shortly after that, as fundamentally changing things.

"The old Selmians, the people of wealth, they'll still be powerful people, whoever the mayor is, whether's he's black or white," Mr. Smitherman said, the cigarette smoke curling around the City of Selma seal behind him. "You can't run a city without money. You've got to deal with bankers. It won't be the South as we've known it. It won't be Selma, Ala., as we've known it. But it will still be Selma."

Next: Voices of the two Souths.

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Newsrooms look a little more like America

Metropolitan life

By Adrienne T. Washington

Looking out over rows and rows of rainbow-colored journalists last week in Atlanta, I was momentarily moved to tears.

More than 5,000 black, Hispanic, Asian and American Indian journalists gathered to eat lunch in a warehouse section of the Georgia World Congress Center because convention organizers could not find any other space large enough to accommodate the unusually large crowd.

It's an amazing enough feat to feed that many people in one sitting. I had to chase down waiters and supervisors for crumbs for my table, which went without a server. Given the circumstances, such gliches were predictable and understandable.

But even more awesome was studying the multiracial, multicultural faces and customs of the luncheon attendees. It was an inspiring sight. I remember 15 years ago when a gathering of black journalists couldn't fill a hotel meeting room.

It seems we have been struggling to increase the number of minorities in journalism for so long that we really didn't comprehend how far we've come toward our goal of diversifying America's newsrooms from top to bottom.

If nothing else, the Unity '94 conference last week forever dispelled the myth that qualified minority journalists are few and far between.

The historic conference was designed by leaders of the Asian American Journalists Association, the National Association of Black Journalists, the National Association of Hispanic Journalists and the Native American Journalists Association to promote newsroom diversity. Speaking for thousands, they accomplished their overall mission: to encourage "the media to hire and promote journalists of color as part of an effort to make U.S. newsrooms more reflective of the nation."

In 1978, 10 years after the Kerner Commission called on media organizations to hire more minorities, the American Society of Newspaper Editors issued its Goals 2000 initiative. Newsroom staffs were to be 30 percent minority to represent the nation's minority population, expected to reach 32 percent in the early 21st century. News managers will fall far short of that goal at the present rate of 10.5 percent minority employees vs. today's 26 percent minority population.

President Clinton via satellite told the journalists of color, "I believe that all of us in positions of responsibility, with influence, should strive to make a process that involves all of the American people — their insights, their knowledge, their experience and take advantage of their talents."

He said the media should be held to the same diversity standards he has set for his administration. Set, not achieved, mind you.

It is important that media organizations diversify. Not to satisfy some arbitrary numbers, but to ensure that the whole of America's story is told — and told from more accurate and varying perspectives. What many readers and viewers complain about is stereotyping and the distorted pictures and images presented of their respective ethnic groups.

Would we feel differently in the Washington area if we had American Indian journalists — or Native Americans as many of them choose to label themselves — to examine and explain why the issue of using tribal names for sports mascots is so offensive to them?

Judging from the bright, enthusiastic people I spoke to, there are more than enough "journalist of color" to tell the untold stories of minority communities if no one else will.

No one wants a seat at the table simply because of his ethnic background. They want to at least be invited in hopes of adding a little spice to the conversation.

"If I was a white manager, I'd be scared to ever say again that I cannot find a qualified minority [to hire in the journalism industry,]" said Dwight Ellis, vice president of human resource development at the National Association of Broadcasters.

Dennis Stern, senior editor of the New York Times, was one of several hundred recruiters from the 150 news outlets at the convention job fair. Mr. Stern, my city editor at the first journalism job I held at the old Washington Star, said his paper interviewed numerous applicants and found "quite a few good people" it would like to hire eventually.

Another recruiter said "this is one-stop shopping."

WRC-TV cameraman Louis Urbina, who normally dresses casually and comfortably for his assignments, was looking so dapper standing around in an olive-colored suit that he said several recruiters asked him if he could "do the weather, or do sports," anything other than his current experience warrants.

Still, not all news executives were convinced of the qualifications of the conferees.

Even in the midst of this so-called "meat market," at least one senior executive of a national newspaper told a huge crowd listening to a panel discussion on political correctness that he "used to have two black editorial writers, but he didn't at the moment." But the next one he hires, he said, "will be a black conservative." He worried about the flak he will take from his own community.

How's that for being racist, sexist and paternalistic in one fell swoop?

That editor is living in the dark ages, and his New York paper will eventually suffer if he doesn't start to realize that American demographics and markets are changing. He'll be left on the side of the road as the multicultural, multinational information superhighway rolls right by him.

As the American face changes, so should its work force. To that end, I found Unity '94 a promising event.

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THE WEEKLY NEWSMAGAZINE

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The Poorest Place In America

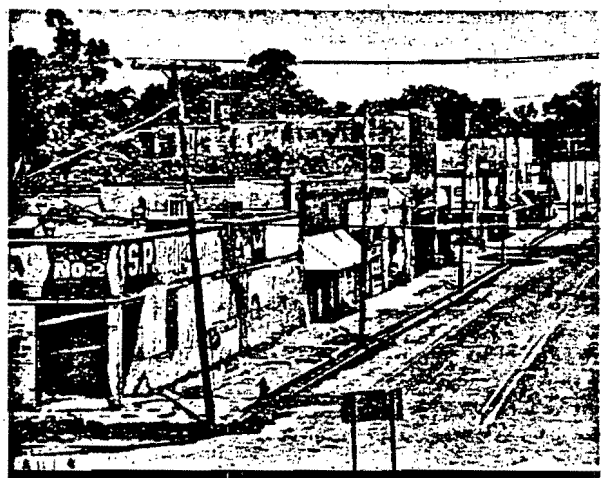
Lake Providence's poverty is extreme and, despite civil rights progress, too familiar in the South

By JACK E. WHITE
LAKE PROVIDENCE

THE TOWN HAS NO PUBLIC PARKS OR swimming pools, no movie theaters, no shopping malls, not even a McDonald's or a Wal-Mart. In fact, business in Lake Providence, Louisiana, is so bad that even the pawnshop has shut down. "The only recreation we have," says a resident, "is poor people's fun: drinking, drugs, fighting and sex." Restless teenagers mill around narrow streets lined with burned-out houses and dilapidated trailer parks. "We've got all the problems they have in New York and Chicago, but nothing to fight them with," says Mayor James W. Brown Jr. If there is a poorer place in America, the Census Bureau cannot find it.

No community in the country needs help more—and Lake Providence has turned to God and Washington for assistance. One Sunday evening not long ago, 400 of the town's 5,500 people gathered for a gospel concert. "Weeping may endure for the night! But if you hold on, joy—joy!—is coming in the morning!" shouted one singer, paraphrasing the 30th Psalm. The crowd broke down in tears and fervent amens. This summer the town, joined by two almost equally destitute communities in neighboring Mississippi and Arkansas, submitted its application to have the area declared a federal "empowerment zone." If they succeed, tax breaks and grants worth $100 million will shower down on this neglected corner of the rural South. "We ought to qualify if anyone does, since there's no place that's worse off than we are here," says James Schneider, president of a local bank.

Lake Providence is an extreme but not atypical example of the ambivalent legacy of the Freedom Summer of 30 years ago, when hundreds of volunteers, both black and white, went south to promote the cause of racial justice. That effort helped trigger the passage of civil rights laws that overthrew long-standing patterns of racial oppression in little towns like Lake Providence all across the South. Yet today for every sign of progress there is a sign of stagnation, or even regression. Blacks can elect their own to political office, but economic power remains largely in the hands of the white minority. Restaurants serve everyone, but many blacks cannot afford them. Schools are officially desegregated, but few classes are racially mixed. Thirty years ago, Lake Providence blacks could hope their lot would improve. Today, despite the passage of laws and the passage of time, they seem even worse off than they were.



DEPRESSED DOWNTOWN: On the once bustling main street, business is so bad even the pawnshop has folded

The 1990 census found that the median annual household income in Block Numbering Area 9903, which covers the southern two-thirds of Lake Providence and three-quarters of its population, was only $6,536—less than half the official poverty level of $14,764 for a family of four and the lowest in the U.S. Two years later, a Children's Defense Fund study found that in East Carroll Parish, where Lake Providence is located, 70.1% of children younger than 18, or 2,409, were living in poverty, the highest rate in the nation—and this amid staggeringly high rates of infant mortality, teenage pregnancy and drug use.

Meanwhile, jobs are scarce, low paying and seasonal. For most of the year, hundreds of families subsist on welfare: a single mother with one child gets $123 a month, a family of five, $370. For many the only available work is backbreaking minimum-wage jobs in the nearby cotton fields. Some older men, like John Henry Jackson, don't seem to do much but stand around drinking and swapping stories about the old days, when they worked on the farm and "followed some funky-ass mules all day long, smelled just like 'em and didn't get no money."

Inevitably, almost everyone who can escape from Lake Providence does so. "I'd rather shoot myself than stay here. It would be a wasted life," says Karva Henderson, who graduated from Lake Providence's high school in June. She plans to go to college and wants never to return.

The urge to flee is more urgent because staying behind often leads to tragedy. Such was the fate of Calvin Jones, who until last spring was one of Lake Providence's most promising young men. At 18, he was not only an honor student and a track and football star, but also a serious churchgoer who taught Sunday school and composed rap songs urging younger children to stay out of trouble. For Martin Luther King Day last year, his classmates and teachers chose him for keynote speaker. "I just talked about accomplishing your goals and not falling prey to society," Jones remembers. "I talked about the importance of having God in your life and the importance of get-

cont'd.

TRAGIC TEAMWORK: Soon after Calvin Jones, left, gave his inspiring King Day speech, he got together with Charles Reed, right, a drug user, and burned down the high school. Why did they do it? "There was no reason," said Calvin, now in prison for arson. "I'm just sorry I didn't do more to stop it."

ting your education. I told them to strive 110% for the goals that they want to accomplish, and don't become another victim."

Less than 48 hours later, Jones became another sad twist in the sorry history of Lake Providence. On the evening after his speech, Jones got together with Charles Reed, 19, a young man who was everything that Jones was not: a heavy boozer and drug user filled with sullen rage. Reed had never liked his do-gooder schoolmate Jones. "I wanted to hurt that dude the first time I seen him," Reed recalls. "It's just something about people I have when I first see them. I just don't like them." Yet on that night enmity dissolved in a haze of malt liquor, and somebody got an idea. Along with another young man, Jones and Reed wound up at the high school, and the school ended up in flames.

Calvin Jones stood among the crowd of onlookers as the blaze demolished the school. "When I saw the school burning, tears just came rolling down my face," he says. "My father went to that school, and three of my brothers had graduated from there, and I was getting ready to graduate."

Three months later, Jones, Reed and another teenager were arrested for arson. All three were tried and convicted; Jones and Reed were sentenced to prison; the other youth was released because he is a juvenile. Why did they do it? "There was no reason," says Calvin. "I'm just sorry I didn't do more to stop it." Perhaps it was just another attempt to change the bitter reality of Lake Providence.

THE QUESTION FOR LAKE PROVIDENCE is how much $100 million in tax breaks, job-training subsidies and other federal grants could change the desperate life of its people. The complex economic and social factors that have sunk the town in misery have been in place since the days of slavery. After the Civil War, freed slaves stayed on as sharecroppers and independent farmers, but after World War II the widespread use of farm machinery destroyed thousands of agricultural jobs. At the same time, plantation owners resisted industrial development that could have brought new jobs and higher wages.

As a result, East Carroll Parish lost nearly half its population after 1940, shrinking from more than 19,000 to 9,800 and depriving Lake Providence of potential black leaders—people like William Jefferson, who left to become a Harvard Law School graduate and a Congressman from New Orleans, and Charles Jones, who is now a member of the state senate.

Meanwhile, the absence of jobs and talent has only served to reinforce the age-old Southern pattern of white authority and black subservience. "We've still got a lot of people working in white folks' kitchens or driving tractors," says Mayor Brown. "They're afraid to speak up for themselves because they're afraid of losing their jobs. They still have to say, 'Yassir, whatever you say.' "

Though black voters outnumber whites 2 to 1 and constitute majorities in most local government districts as the result of a long-running voting-rights case, their political power is limited. They control the poorly funded town government, but whites outnumber them 6 to 3 on the parish Police Jury (comparable to a county board of supervisors), which controls the bulk of local government spending. Blacks have not capitalized on their political opportunities, says the Rev. C.H. Murray, a Baptist minister, because "there's still a lot of slave mentality here, people thinking they should wait on the Lord to solve our problems." According to local leaders, easily intimidated black voters sometimes sell their votes.

Many whites believe their hold on power is the bulwark that keeps Lake Providence from descending into barbarity. "We don't have any colored leadership," says Captan Jack Wyly, a lawyer and prominent power broker who says he understands the blacks because long ago his ancestors owned theirs. "When I came home from the Army in 1945, 20% to 25% of our land was owned by blacks. But the welfare system has just undermined the incentive to work. When Daddy died, they'd sell their property, buy a Buick and go out West to Las Vegas or somewhere. They lost their work ethic; they lost their discipline with all this gimme stuff. Who would have thought that Negro girls would get pregnant to get on food stamps? Now they do it all the time." Wyly's biggest fear is that whites will be infected by what he considers black amorality. "Goddam, if we have two races exploding, that's the end of America!"

And if Washington makes Lake Providence part of an empowerment zone, what would it do for the town? Drawn from ideas submitted by average citizens, the plan is an ambitious mixture of the grandiose and the mundane. It envisages using federal tax breaks to attract a factory that could employ hundreds of unskilled workers. It proposes making Lake Providence the economic hub of the entire region by creating a "one-stop capital shop," a lending office where small businesses from across the country could apply for federal loans. It also foresees using the area's proximity to the Mississippi and many beautiful lakes as the basis for tourism.

These ideas strike local skeptics as overly ambitious and doomed to fail. "Just wait until the mosquitoes start bitin', and see how many tourists you get," scoffs Wyly. Emmanuel Osagie, the Southern University economist who drew up the proposal, believes that such objections are beside the point. "I don't think that in an area like this you can raise people's expectations too high," he says. "We know that the empowerment zone won't solve all our problems, but it can be a start. The problem here is to get people to believe that things can really get better. People here have been looking down at the ground for so long that all they can see is their feet." ■

Minority Rights in the Voting Booth

New York City's Chinese-Americans and the Justice Department in Washington are pressing the city's Board of Elections to transliterate candidates' names into Chinese characters on ballots in districts with large Chinese-speaking populations. The board points out that it already supplies sample ballots and voting instructions in Chinese, and translators at polling places, but says the format of its mechanical voting machines does not have space to add a line of Chinese characters. It seeks more time to introduce electronic voting machines that can handle the characters easily.

That sounds like the foot-dragging bureaucratic arguments that have been raised all over America at one time or another against giving minorities their rights. It is no excuse for not obeying the law.

The 1975 amendments to the Voting Rights Act required that minority groups be given bilingual help in places where 5 percent of the citizens of voting-age speak the same foreign language and lack proficiency in English. At the time, only Hispanic-Americans fit that description. But the legislation established unmistakable national policy that has stood for almost 20 years: bilingual ballot aid for sizable minorities with language difficulties. It is not open to local quibbling.

In 1992, Congress added an alternative standard for minorities in big cities; bilingual help is now also required anywhere there is a group of 10,000 voting-age citizens with limited English ability. That qualifies Chinese-Americans in Manhattan, Brooklyn and Queens, and may soon qualify the growing numbers of Korean-Americans, too.

The 1992 legislation told New York City and others in the same situation to get moving. The Justice Department followed with a letter to the board last August and another in May. No deadline was set, and the board just last week requested more time. Dissatisfied Chinese-American community groups still want bilingual ballots for the Sept. 13 primary, and may take the issue to court.

A gradual transition to new procedures with new electronic equipment would surely be smoother than a court-ordered changeover on the old equipment by Sept. 13. But without prodding, when minority rights are concerned, there always seems to be one more reason to delay. That is reason enough to push the board to change now.

U.S. CHAMBER OPPOSES HOUSE ACCORD LINKING TRADE TO LABOR, ENVIRONMENT

The U.S. Chamber of Commerce Aug. 18 urged Congress to reject the agreement reached earlier this week by the House Ways and Means Committee to include language on labor and environmental protection in proposed legislation to implement the Uruguay Round multilateral trade agreement.

Willard A. Workman, vice president for international affairs at the chamber, said that the organization supported the position taken by Sen. John C. Danforth (R-Mo), a member of the Senate Finance Committee, who said it would be a "fundamental mistake" for the United States to pursue a trade policy linking trade to labor and environmental issues.

Danforth said in a letter to U.S. Trade Representative Mickey Kantor Aug. 17 that he would "actively oppose" any implementing legislation that "expressly or implicitly" permits the administration to negotiate agreements authorizing the use of trade sanctions to obtain labor and environmental objectives.

"I believe it would be a fundamental mistake for the United States to pursue a trade policy linking trade to labor and environmental issues," Danforth said in his letter to Kantor.

Earlier Aug. 17, the House Ways and Means Committee agreed to propose in a conference with the Senate the renewal of the administration's authority to negotiate future trade agreements under congressional "fast-track" procedures for up to six years, with provisions linking trade to labor and environmental protection.

Kantor told reporters that the committee proposal would allow the administration to impose sanctions against countries that erect labor and/or environmental barriers to trade.

The House Ways and Means Committee and the Senate Finance Committee are scheduled to meet today to begin an informal conference on the proposed legislation.

But Rep. Sam Gibbons (D-Fla), acting chairman of the House committee, told reporters Aug. 17 that he favors delaying consideration of the "fast-track" proposal until later in the conference process, after the House Rules Committee has been consulted.

Earlier this month, the Senate Finance Committee agreed not to include provisions on renewing "fast track," which expired on April 15, in its proposal for the House-Senate conference.

The "fast track" procedure requires Congress to vote on any trade agreement negotiated by the administration without amendment.

The chamber's Workman said the Ways and Means agreement "continues to leave the door open for the use of trade sanctions to enforce labor and environmental agreements."

"There should be no fast track authority provisions in the Uruguay Round implementing legislation that could be used to negotiate agreements authorizing the use of trade sanctions for labor and environmental purposes," Workman said. "We support congressional efforts in the upcoming House-Senate conference . . . to restrict, clearly and unequivocally, the scope of fast track authority to the strictly commercial aspects of trade policy."

The Uruguay Round agreement was signed by more than 100 countries last April after more than seven years of negotiations under the General Agreement on Tariffs and Trade.

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DOT MANDATES EMPLOYERS USE NEW FORM FOR WORKPLACE DRUG TESTING PROCEDURES

Employers in the transportation industry will have to use new "improved" standard forms for their workplace drug testing programs under changes the Department of Transportation is expected to publish Aug. 19.

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Segregation In Schools Increases

U.S. Study Says 70% Of Blacks, Hispanics Are Racially Isolated

[Washington Post 12/14/93]

By Mary Jordan
Washington Post Staff Writer

Racial isolation in America's schools is increasing, with 70 percent of black and Hispanic students now studying in classrooms with a predominantly minority enrollment.

Despite rapid movement toward integration from the mid-1960s to the early 1970s, and slow progress until 1988, new Education Department figures now show the first steps back toward increased school segregation.

The growing concentration of minority students in large central cities, and the development of solid segregation patterns in the suburbs around them, is contributing to increasing segregation, according to a study released yesterday by the National School Boards Association.

"The civil rights impulse of the 1960s is dead in the water and the ship is floating backward toward the shoals of racial segregation," said Gary Orfield, the director of the Harvard Project on School Desegregation, which conducted the study. "For the first time since the Brown vs. Board [1954 Supreme Court] decision, we are going backwards."

The trend away from integration is also being fed by the abandonment of mandatory school desegregation orders in many areas and the belief among local school officials that integration is no longer viewed or enforced, as an important national goal, according to the study and desegregation experts.

The recent questioning by some educators of whether minority children are really better off in majority white schools, changing birthrates and changing immigration patterns also have intensified the concentration of minorities in some metropolitan areas.

Nationally, the percentage of black students attending classes where the majority of students were minority fell from 77 percent in 1968 to 63 percent in 1980. But that number now has risen to 66 percent. For Hispanics, the number is higher, with 73 percent in classes that are predominantly minority.

"We are regressing in this country to a uniquely Americanized form of apartheid," said Jonathan Wilson, the immediate past president of the Council on Urban Boards of Education and a school board member in Des Moines.

Wilson said parents' dissatisfac-

See SCHOOLS, A6, Col. 1

Issues Surface on Civil Rights Act

Continued from page 19

small employers from liability, limit damages depending on the number of employees working for the employer and, at the same time, expose individuals to personal liability. Nonetheless, there is a strong counterargument based on the definitional sections of Title VII and the 1991 act.

The Civil Rights Act of 1991 imposes compensatory and punitive damages liability on "a respondent" and, in Sec. 104(n), defines respondent to include "an employer." The inclusion of an employer's agent within Title VII's definition of employer provides a logical basis for concluding that Congress intended that supervisors and other managerial personnel be subject to Title VII liability, including liability for compensatory and punitive damages, for engaging in discriminatory acts with respect to matters within their managerial authority.

A SECOND perplexing issue under the new act is whether a higher quantum of proof is necessary to recover punitive damages than is necessary to establish the underlying intentional violation of Title VII, the Americans With Disabilities Act or the Rehabilitation Act.

Under Sec. 102(b)(1) of the 1991 act, punitive damages are available in cases of intentional discrimination only when the respondent is shown to have discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

Because "intent" is an essential requirement for the underlying violation, and the statute seems to impose an *additional* requirement of "malice" or "reckless indifference" before a victim is entitled to punitive damages, it is not unreasonable to assume that Congress intended a higher evidentiary threshold for punitive damages than that necessary to establish liability in the first instance. Congress could be viewed as having intended a two-tiered scheme of proof, with the second tier reserved for punitive damages.

Under this view, the victim of intentional discrimination would not be eligible to recover punitive damages unless he or she produced some quantum of evidence over and above what is necessary to establish intentional discrimination under the burden-shifting framework prescribed in *McDonnell Douglas v. Green*, a 1976 Supreme Court decision. If a second tier of proof is required for punitive damages "as a matter of law," a defendant likely would keep the issue from the jury in a case in which intentional discrimination is proved by inference.

The legislative history and the structure of the 1991 act seem to lend support to this view. The statute sets forth the entitlement to punitive damages in two separate provisions. Sec. 102(a)(1) states that intentional discrimination must be found before punitive damages can be awarded and Sec. 102(b)(1) states that punitive damages are available only when "the complaining party demonstrates" "malice or reckless indifference." During the legislative debates, various members of Congress emphasized that this made punitive damages available only when intentional discrimination is "egregious."

But a different picture emerges from the body of case law under 42 U.S.C. 1981 and 1983. The language in the new act requiring a showing of malice or reckless indifference to the federally protected rights of others is nearly identical to the standard articulated by the Supreme Court under Sec. 1983 in *Smith v. Wade*, a 1982 case and subsequently extended by the courts to Sec. 1981 in the 1st Circuit case *Rowlett v. Anheuser-Busch*[7] and other cases.[8]

In *Smith v. Wade*, the court held that a jury be permitted to assess punitive damages "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless indifference to the federally protected rights of others." Given the similarity between this standard and the standard in the 1991 act, it is reasonable to assume that Congress meant the same criteria to apply under Title VII as under Secs. 1981 and 1983.

It is the general rule under Secs. 1983 and 1981 that punitive damages are within the jury's discretion once the plaintiff has demonstrated intentional wrongdoing by the defendant. In *Smith v. Wade*, the Supreme Court rejected the employer's argument that the deterrent purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability. The court suggested that the improper motive of the employer in a case of intentional discrimination is both "a necessary element" to a liability finding and "a reason for awarding punitive damages."

In other words, the state of mind necessary to trigger core liability under Sec. 1983 — and inferentially Title VII — appears to be at least as culpable as that required to make punitive damages applicable.

Although *Smith v. Wade* seems strongly to suggest that the question of whether to award punitive damages should go to the jury in every case of intentional discrimination under Title VII, the lower courts have not uniformly applied the holding this way. There is post-*Smith* case authority supporting the two-tiered proof scheme of punitive-damages liability.[9]

A third issue, which thus far has been addressed by only one federal court of appeals, is whether Sec. 107 of the new Civil Rights Act entangles voluntary affirmative action programs. Sec. 107 amends Sec. 703 of Title VII to provide that an employer commits an unlawful employment practice "any time an employment decision is motivated by an impermissible factor. It responds to the Supreme Court's 1989 plurality holding in *Price Waterhouse v. Hopkins*, that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role."

Sec. 107 adds a new Subsection (m), providing that an unlawful employment practice is established when a party demonstrates "that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such a practice was also motivated by other factors."

According to one interpretation, voluntary affirmative action may be implicated by Sec. 107. Because voluntary affirmative action seemingly is motivated by considerations of "race, color, religion, sex, or national origin," it could be expected that the provision would be cited in challenges to employment decisions made pursuant to voluntary affirmative action plans that give favorable treatment based on one or more of the prohibited criteria.

That occurred in a 1992 9th Circuit case, *Officers for Justice v. Civil Service Commission of the City & Co. of San Francisco*.[10] In *Officers for Justice*, however, the court looked beyond Sec. 107 to the language of Sec. 116 of the new act. Sec. 116 provides: "Nothing in the amendments shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law."

The 9th Circuit, construing the provisions together, held that the language of the statute is clear — "affirmative action programs that were in accordance with law prior to passage of the 1991 Act are unaffected by the amendments." Similarly, the EEOC has determined that Sec. 107 does not affect otherwise lawful, voluntary affirmative-action plans.[11]

A FOURTH major issue, which seems to have been overlooked amid the excitement surrounding the passage of the Civil Rights Act of 1991, is whether older workers gain the benefit of the new provisions. One of the earliest commentaries on the 1991 act noted that although the new rules for disparate impact claims and mixed motive cases apply on their face only to Title VII and not the Age Discrimination in Employment Act of 1967, "it would be astonishing if courts hearing ADEA cases do not follow the same rules."[12] "It may well be, however, that the lower courts do not have that freedom."

Although the 1991 act states as one of its purposes that it responds to recent decisions of the Supreme Court in order to provide adequate protection to discrimination victims, the provisions that respond to the Supreme Court decisions do not amend the ADEA. This

It is unclear how Sec. 107 of the new act relates to voluntary affirmative action.

is likely the most critical factor in assessing the continuing vitality of those decisions to cases brought under the ADEA.

Because the substantive provisions of the ADEA were borrowed verbatim from Title VII of the Civil Rights Act of 1964, the Supreme Court determined in *Oscar Mayer & Co. v. Evans*[13] and in *Trans World Airlines v. Thurston*[14] that certain interpretations of Title VII apply equally in the context of age discrimination.

Consequently, and not at all surprisingly, the lower courts treated *Wards Cove Packing Co. v. Atonio*,[15] *Price Waterhouse v. Hopkins* and *Lorance v. AT&T Technologies*[16] as binding precedent under the ADEA. At the time of the passage of the Civil Rights Act of 1991, at least four circuit courts had applied *Wards Cove* to ADEA disparate impact cases,[17] three had applied *Lorance* to the ADEA[18] and five had applied *Price Waterhouse* to ADEA mixed-motive cases.[19]

The rule that ADEA interpretations should follow those of Title VII does not apply when the dispute centers on a discrete question of statutory construction and the language of the statutes differs. Although it may seem incongruous not to apply the new provisions to ADEA claims, Congress explicitly amended only Title VII and not the ADEA when it responded to *Wards Cove* (Sec. 105), *Price Waterhouse* (Sec. 107) and *Lorance* (Sec. 112).

Plaintiffs who seek to apply the new provisions to the ADEA must overcome the general rule of statutory construction that the omission of a new provision from a similar statute concerning a related subject is significant to show that a different congressional intent existed. Because, as stated in *Russello v. U.S.*,[20] Congress is presumed to legislate intentionally and purposely in the disparate exclusion of language in related statutory provisions, the courts are not free to ascribe a language difference between related statutes to a simple mistake in draftsmanship.

The 1992 case of *Rebar v. Marsh*[21] is instructive. In that decision, the 11th Circuit determined that congressional failure to include a venue provision in the ADEA similar to the one contained in Title VII should be corrected by Congress, not the courts.

Moreover, the fact that Congress expressly amended the ADEA in other particulars seems to foreclose the argument that the failure to address the ADEA in Secs. 105, 107 and 112 was inadvertent or incidental oversight that should be corrected by the courts. The new ADEA amendments demonstrate that Congress, when drafting the Civil Rights Act of 1991, was well aware of the ADEA and its relationship to other federal employment discrimination statutes; that Congress contemplated amendments to the ADEA as part of its omnibus legislation and that Congress amended the ADEA when it deemed necessary.

Congress took a broader approach in Sec. 108 when it responded to the 1989 Supreme Court decision *Martin v. Wilks*.[22] Congress specifically extended Sec. 108 beyond Title VII to any "claim of employment discrimination under the Constitution or Federal civil rights laws."

The lower courts that have addressed whether Congress intended the new Title VII principles to apply to cases under the ADEA have held that the Civil Rights Act does not apply to ADEA cases.[23] Overall, the provisions of the Civil Rights Act of 1991 will supply plenty of grist for the appellate courts. Not only do the above questions remain open but so do many others — including the issue to be decided during the coming Supreme Court term in *Landgraf v. USI Film Products* and *Rivers v. Roadway Express Inc.*[24] whether the new act applies retroactively to pre-act conduct. The court and a smiling horde of appellate lawyers will be dealing with these and other issues for years to come.

(1) Pub. L. 102-166, 105 Stat. 1071-1100 (codified as amended in scattered sections of 42 U.S.C. (1992).

(2) 791 F.2d 439 (5th Cir. 1986).

(3) 684 F.2d 360, 362 (6th Cir. 1982).

(4) 991 F.2d 583 (9th Cir. 1993).

(5) C.A. 92 C 7330 (N.D. Ill. 1993).

(6) 411 U.S. 792 (1973).

(7) 461 U.S. 30 (1982).

(8) 832 F.2d 194 (1st Cir. 1987).

(9) See 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Democratic California Rep. Don Edwards' interpretative Memorandum) ("Punitive damages are available under [Sec. 1981A] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. 1981. No higher standard may be imposed").

(10) See, e.g., Beauford v. Sisters of Mercy, 816 F.2d 1104 (6th Cir. 1987).

(11) 490 U.S. 228 (1989).

(12) 979 F.2d 721, 725 (9th Cir. 1992).

(13) EEOC Policy Document N 915.002, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 7, 1992).

(14) L. Larson, Civil Rights Act of 1991, at 8 (1991).

(15) 411 U.S. 750 (1979).

(16) 469 U.S. 111 (1985).

(17) 490 U.S. 642 (1989).

(18) 490 U.S. 900 (1989).

(19) MacPherson v. University of Montevallo, 922 F.2d 766, 771-773 (11th Cir. 1991); Davidson v. Board of Governors of State Colleges & Universities, 920 F.2d 441, 444 (7th Cir. 1990); Abbott v. Federal Forge Inc., 912 F.2d 867 (6th Cir. 1990); and Lowe v. Commack Union Free School District, 886 F.2d 1364 (2d Cir. 1989).

(20) Hamilton v. First Source Bank, 928 F.2d 86, 88 (4th Cir. 1990); Barrow v. New Orleans Steamship Ass'n, 932 F.2d 473, 477-478 (5th Cir. 1991); and EEOC v. City Colleges of Chicago (7th Cir. Sept. 16, 1991).

(21) Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991); Visser v. Packer Eng'g Ass'n, 924 F.2d 655, 658 (7th Cir. 1991) (en banc); Burns v. Gadsden State College, 908 F.2d 1512, 1517-1518 (11th Cir. 1990); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 315-316 (6th Cir. 1989); and Grant v. Hazelett Strip Casting Corp., 880 F.2d 1564, 1568-1569 (2d Cir. 1989).

(22) 464 U.S. 16, 23 (1988).

(23) 959 F.2d 216 (1992).

(24) 490 U.S. 755 (1989).

(25) Thompson v. Prudential Ins. Co., 59 FEP Cases 268 (D.N.J. 1992) (Sec. 112); Morgan v. Servicemaster Co. Ltd. Partnership, 57 FEP Cases 1423 (N.D. Ill. 1992) (Sec. 107); and Guillory-Wuerz v. Brady, 58 FEP Cases 1264 (D. Colo. 1992).

PHOTOCOPY PRESERVATION

Who's to rescue the middle class?

The American middle class is disintegrating and turning into three new groups: An underclass largely trapped in central cities and isolated from the growing economy; an overclass profitably positioned to ride the waves of change; and an anxious class, most of whom hold jobs but are justifiably uneasy about their own standing and fearful for their children's future.

What divides the over, the under and the anxious classes is both the quality of their formal educations and their capacity and opportunity to learn throughout their working lives. Skills have always been relevant to earnings, of course. But they have never been as important as they are today. Only 15 years ago, a male college graduate earned 49 percent more than a man with only a high school degree. That's a sizable difference, but it's a divide small enough for both men to occupy terrain each would call middle-class. In 1992, a male college graduate outearned his high school graduate counterpart by 83 percent — a difference so great that they no longer inhabit common territory or share common prospects. Women are divided along similar, though slightly less stark, lines.

Traditionally, membership in the American middle class included not only a job with a steadily increasing income, but a bundle of benefits that came with employment. But a gap has grown here as well. Employer-sponsored health coverage for workers with college degrees has declined only slightly, from 79 percent in 1979 to 76 percent in 1993. But for high school graduates, rates have fallen further: 68 percent to 60 percent over the same period. And rates for high-school dropouts have plunged — from an already low 52 percent in 1979 to only 36 percent last year.

Retirement will only harden these divisions. Nearly two out of every three workers with college degrees get pension coverage on the job. More than three out of four high school dropouts do not.

But earnings and benefits don't even tell the complete story. Merely getting a job and holding onto it depend ever more on strong skills. In the 1970s, the average unemployment rate for people who had not completed high school was 7 percent; by 1993 it had passed 12 percent. Job loss for high school graduates has followed a comparable trajectory. By contrast, the unemployment rate for workers with at least a college degree has remained around 3 percent.

In a seeming paradox of today's economic news, financial markets fret that unemployment is too low to contain inflation, even while 8 million willing American workers remain jobless. Part of the answer to the apparent contradiction is that markets for highly skilled labor are becoming tight in many parts of the economy, creating the conditions that can kindle inflation worries. But millions of less-skilled workers remain idle or underemployed. This wasted work force is walled off by skill barriers from the leading edges of the economy, where capacity constraints loom.

The best way to expand the economy's capacity and lower the level of unemployment needed to bridle inflation is to dismantle these walls by preparing underutilized workers for more productive work.

As they take hold in the neighborhoods and workplaces of America, these forces are ominous. Consider the physical separation they have already helped forge.

The overclass has moved to elite suburbs — occasionally into their own gated communities or residential compounds policed by their own security forces.

The underclass finds itself quarantined in surroundings that are unspeakably bleak, and often violent.

And the anxious class is trapped, too — not only by houses and apartments often too small for growing families, but also by the frenzy of effort it takes to preserve their standing, with many families needing two or three paychecks to deliver the living standard one job used to supply.

In other words, even as America's economic tide continues to rise, it no longer lifts all boats. Only a small portion of the American population benefited from the economic growth of the 1980s. The restructurings and capital investments launched during the 1980s and continuing through the 1990s have improved the productivity and competitiveness of American industry, but not the prospects of most Americans. And the people left behind have unleashed a wave of resentment and distrust — a wave buffeting government, business, and other institutions that the anxious class believes have betrayed them.

This creates fertile soil for the demagogues and conspiracy theorists who often emerge during anxious times. People in distress, people who fear their future, naturally cling to what they have and often resist anything that threatens it. People who feel abandoned — by a government that has let them slide or a company that has laid them off — respond to opportunists peddling simplistic explanations and sinister solutions. Why are you having trouble making ends meet? We're letting in too many immigrants. Why are you struggling to pay your bills? Affirmative action tilts things in favor of African-Americans and Hispanics. Why is your job at risk? Our trade policies have not been sufficiently protectionist.

As a solution, we can't turn back the clock and return to the safe old world of routine mass production that dominated postwar America. Efforts to do so — say, by keeping foreign investment and goods outside our borders or by stifling technological advances — would not resurrect the old middle class. They would only inhibit the ability of every American to prosper amid change.

The real solution is to give all Americans a stake in economic growth, to ensure that everyone benefits from our newfound competitiveness. This economy will not be at full capacity until we tap the potential of all our citizens to be more productive.

Individuals and families shoulder much of the responsibility here, of course. Ultimately, they must face the realities of the new economy, and ensure that they and their children have the basic intellectual tools to prosper in it. Government has a role, too. It can clear away some of the obstacles — improving the quality of public education, setting skills standards, and smoothing the transition from school to work and from job to job.

But individuals, however resourceful, and governments, however reinvented, can't build a new middle class on their own. Business has an indispensable role to play. Unless business joins in a compact to rebuild America's middle class — training and empowering ordinary workers to be productive and innovative — this task cannot succeed.

There are two good economic reasons for business to enlist: First, the members of America's imperiled middle class are key productive assets. Second, they form the majority of most companies' customers.

What should be the specific contents of this compact? I cannot predict the exact provisions. Obviously, one means of committing American business to work force investment would be through a simple requirement that firms spend a small portion of their payrolls upgrading the skills of all employees. The administration is not advancing such an option as a formal policy proposal because we are not convinced it is the best way to achieve the goal of stepped-up investments in worker skills. Flat requirements like this can invite endless legal pirouettes, resulting in ever more intrusive regulation.

I hope American business and government can discover together a better way — voluntary commitments to, and disclosure of, such work force investments; cooperative agreements among firms in an industry to share the costs of basic-skill training; agreements between large firms and their smaller suppliers and customers to do so; employee education as an object of collective bargaining, awards or certifications for businesses that invest substantially in their workers; collaborations between high schools and companies to hire school-to-work apprentices; shifts in the tax code to create added incentives for work force training.

These and other approaches — alone or in combination — may be more effective than a uniform requirement. But if we cannot develop a superior approach, it would certainly be better to embrace that method than to abandon the goal.

The centrifugal forces that are pulling America apart call for even greater resolve. Americans can build a new middle class, and a new ladder into it for the underclass. But without the redoubled energies of American business the sturdy middle class that was once our country's defining quality will continue its steady erosion.

Robert Reich is the secretary of labor. ©1994, NPQ. Distributed by the Los Angeles Times Syndicate.

THE WASHINGTON POST WEDNESDAY, OCTOBER 12, 1994

AN AFFAIR TO REMEMBER

Henry Cisneros Has Paid for His Indiscretion. So Has Linda Medlar.

By Guy Gugliotta
Washington Post Staff Writer

LUBBOCK, Tex.

They might have made quite a pair, the big-haired blond Anglo fund-raiser and the elegant Latino mayor with the presidential ambitions, but they never got a chance to show it off. And they almost certainly never will.

Now in her mid-forties, Linda Medlar can still don a deep purple suit and make it work, but since her celebrated love affair with then-San Antonio Mayor Henry Cisneros made headlines six years ago, she has lost her career, lost her husband and, she says, lost her self-respect.

"You know, it was almost as if I wasn't a person—Henry was the star and I was expendable," she said in her lawyer's office. "That's just the way things are in this life."

Twice hospitalized and suffering from anxiety and depression, she is a brittle, teary caricature of the *femme fatale* she was once purported to be. With debts she says she can't pay, and jobs she can't get, she decided to take action.

In July Medlar sued Cisneros for $256,000, conscience money she says Cisneros agreed to pay her for the heartache and destitution that she says has been her lot for so long. She said that she hates that she had to do it, and she hates the publicity it has brought her. She talks now because she says her story has never been told.

For Cisneros, as well, it has been a long road, but where Medlar has remained silent, he has talked. And talked. And talked. He acknowledged the affair when it became public, and he left City Hall rather than further complicate his life. Eventually, he and Medlar broke it off, and he put his marriage back together. While the experience was humiliating for him, he managed to salvage his reputation and turn himself into a figure of some sympathy.

He earned enough money to make payments to Medlar for four years, even after he decided to roll the dice and seek a position in the Clinton administration. And he talked to the transition team and the FBI about the payments. It was "humanitarian assistance," they concluded, and Clinton made him secretary of Housing and Urban Development, warts and all.

But now the Justice Department is trying to decide whether to open an investigation into whether Cisneros told the whole truth to the FBI.

And Cisneros has talked about that: "The essential facts were there at every step of the vetting process," he said. "We welcome the inquiry." An initial finding is scheduled by the end of this week.

The outcome for Cisneros is uncertain, but for Medlar it has already caused serious damage. She got several jobs, but quickly lost them, she said, when her employers found out who she was. Her lawyers contend that she fell victim to a double standard: Society could forgive Cisneros's marital indiscretion, but Medlar would be a scarlet woman for all time.

See CISNEROS, C4, Col. 1

CISNEROS, From C1

As Medlar tells it, the fateful agreement was made at her home in January 1990. After a love affair that had lasted almost three years, she was out of money and no closer to marrying Cisneros than she had ever been.

Cisneros understood that he had caused her grief, she said, and wanted to do the right thing. They agreed that he would pay $4,000 per month to support her and her teenage daughter. This was a bit more than the $44,000 per year Medlar had earned working as a fund-raiser for Cisneros, and about what she thought she needed to run her household.

But only until I can get a job and get back on my feet, Medlar said.

"No, no," she quoted Cisneros as saying. "This is forever."

As far as she was concerned, the deal was a verbal contract "etched in stone."

Cisneros remembers it differently.

Yes, he felt he should help. But not forever: "I have said publicly before that the honorable course was to assist her as long as I could," Cisneros said in an interview.

In her lawsuit, Medlar alleged breach of contract when the payments stopped in 1993, saying the $256,000 would tide her over at $4,000 per month, including arrearage, until her daughter finished college in 1999.

Then, last month, she accepted a $15,000 fee to tell her story on the tabloid television program "Inside Edition." She also provided 14 transcripts of telephone conversations with Cisneros she began to tape secretly in late 1992. The Justice Department is comparing the tapes with the statements Cisneros made to the FBI before his January 1993 confirmation hearings.

The fact that Cisneros made payments to Medlar may have been known to the Clinton administration and the FBI—in all, he paid $213,000 over four years, including $55,000 in 1993 when he was a sitting Cabinet secretary. But the public didn't know until Medlar filed suit and talked on "Inside Edition."

She never wanted to ruin Cisneros, she said in a long interview in her lawyer's office. She went on "Inside Edition" because she was "desperate" for money for home mortgage payments, and never thought the show would play up her suspicion that Cisneros lied to the FBI. All she wants, she said, is for the payments to resume, and "logically, if Henry's career is over, it doesn't help me at all."

A Warning From God?

Honor and fairness loomed large in the Cisneros-Medlar affair, almost from the moment in March 1987 when it began after a New York fund-raising reception, a limousine trip around town and a carriage ride in snowy Central Park.

Not yet 40, Cisneros already had people touting him as potentially the first Latino president of the United States. He was in his third term as San Antonio mayor, a striking man and a compelling speaker who entertained thoughts of running for governor of Texas. Medlar was a year younger, handsome, willowy, with a blossoming career as a political fund-raiser. She had started working for Cisneros in 1986.

Both were married, Cisneros since 1969 to his high school sweetheart, Mary Alice Perez, and Medlar to San Antonio jeweler Stanley Medlar. When the affair began, Cisneros had two teenage daughters, and Mary Alice was pregnant with the couple's third child. Medlar had a young daughter.

Children made a difference to both Cisneros and Medlar. In the coming years, Medlar said, she would make many decisions—about moving, about working and ultimately about suing Cisneros—on the basis of what she thought was best for her daughter.

With Cisneros it was more complicated. Three months after the affair began, Mary Alice gave birth to a son, John Paul. The boy, named after the pope, was outwardly healthy, but had a two-chambered heart and transposed great arteries, a potentially fatal birth defect that would eventually require difficult surgery.

"Henry was devastated, not only because of his son . . . but also because we had to figure out how to encompass John Paul into our future plans," Medlar said. "He thought there was a way to do it . . . being a private person for a while, spending as much time as he could with John Paul, and he and Mary Alice coming to some sort of agreement."

It was at this point that the two stories of the affair begin to diverge. The "future plan," according to Medlar, involved Cisneros divorcing Mary Alice and marrying her.

But Cisneros was conflicted. Yes, he was in love with Medlar, and, yes, he and Mary Alice had had problems for years, but he also had his political career and now there was John Paul, arriving like a warning from God to mend his ways.

Unbeknown to Medlar, Cisneros began talking about the affair to San Antonio reporters, swearing them to secrecy and then describing the agonies he was enduring. These confessions bought the pair 19 months of public silence.

Medlar insists she simply went about her business, blithely unaware that the whole town was talking about her liaison. She gave no interviews and saw Cisneros when she could.

One who soon found out about the affair, Medlar said, was Mary Alice. In August 1987, Cisneros quietly fired Medlar and terminated efforts to explore a possible gubernatorial candidacy. Medlar was fired, she suspects, because Mary Alice insisted. Mary Alice declined to be interviewed for this story, because of the pending Justice Department inquiry involving her husband.

Then in September 1987, Cisneros announced he would not seek a fifth two-year term as mayor, citing his desire to spend more time with John Paul and a need to make more money than his speaking fees and his $4,500-per-

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(a)

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year mayor's stipend provided. He didn't mention Medlar.

But he didn't have to. On Oct. 14 the San Antonio Express-News bannered a story under the headline "Cisneros Confesses Deep Love for Medlar," provoking a citywide feeding frenzy as newspapers and broadcasters finally published what they had known for months.

Cisneros handled the scandal with aplomb, acknowledging the affair, refusing to blame reporters for invading his personal life, and asking for "time to work it out."

The confession was the stuff of tabloid dreams, but it also had a purgative effect, for once Cisneros told the story, the game, it seemed, was over. He had sinned, confessed and sacrificed his job—done the honorable thing. When the FBI asked him five years later about payments to Medlar, he could say honestly, "It wasn't hush money—there was nothing to hush."

But what about Medlar? The day the story broke, "I got a call from one of my best friends, who told me I was the most hated woman in Texas," she said. "Everybody thought I had gone to the press, which was just not true."

San Antonio immediately tagged her as the "home breaker" who had cost the city's favorite son his career, she said. But, she added, she was the one who lost two fund-raising jobs within eight hours after the initial story appeared and the one whose spouse filed for divorce.

And while Cisneros sought redemption in the public spotlight, Medlar hunkered down, hoping that the whole mess would go away: "I'm not accustomed to laying my life in front of the press, as a lot of politicians like Henry and a lot of other people are. I could never see myself doing that."

Medlar had no jobs—hasn't found meaningful work since—and simply waited for Cisneros's divorce and for her dreams to become reality. She said Cisneros lived with her for 11 months beginning in December 1988, and insisted that she not contest her own divorce, because "if it was messy, it would bring Henry into it."

And why bother? "He said that, of course, we were going to be together, and I didn't need anything from Stan," Medlar said. So she got no alimony or child support, and she gave back everything, she said, including the Mercedes and the Rolex watch.

Cisneros said he lived in an apartment during the period, not with Medlar, and denies ever putting pressure on her over her divorce: "She made those decisions basically on her own."

Also, he added, "there were serious misgivings on my part" about what he should do. Continuing the affair was going to "disrupt the lives of a lot of people."

Feeling "a profound sense of loss," he said, he told Medlar of his doubts around Thanksgiving 1989. Soon after that he traveled to Houston for a gall bladder operation, then left the hospital with Mary Alice and moved back home.

Medlar, stung and hurting, refused for weeks to see Cisneros, who, she said, was calling her constantly and had left Christmas presents on her doorstep. In January, she finally agreed to see him and in a long tortured conversation she and Cisneros worked out the payment plan. But it wasn't over yet.

Cisneros continued to see Medlar, first in San Antonio, then after Medlar moved back to her home town of Lubbock. The affair only ended in 1991, when Mary Alice filed for divorce and named Medlar as a corespondent. Cisneros stopped seeing Medlar, and the divorce filing was dropped. By this time, on the advice of a friend, Medlar was taping all her telephone conversations with Cisneros.

Still, the payments kept coming. The investment company Cisneros organized did well, and supporting Medlar did not seem a problem. And she continued to need the money.

The Tale of the Tapes

By late 1992, when the "Inside Edition" tapes begin, it is clear that while Cisneros and Medlar still shared intimacies on the telephone, they had also begun to talk past each other.

Medlar said that she knew for several months that Cisneros, deeply involved in the Clinton campaign, would seek a job in the new administration. "It was what he had been thirsting for all these years."

For Medlar this was bad news. From a job where, by his own estimate, he was earning in the neighborhood of $350,000 per year, Cisneros would go to a salaried position with virtually no outside income.

"If you do it," she told him on a tape, "there's no way to work out the financial."

No matter: "Well," he replied, "it's a problem, but my alternative is to die on the vine."

Knowing that she was fighting a losing battle, Medlar listed reasons why Cisneros shouldn't take a Cabinet job. She mentioned other alleged extramarital affairs and brought up a $10,000 cash payment he supposedly accepted from Texas developer Morris Jaffe while he served as mayor. Cisneros repeatedly denied any indiscretions with either women or money.

A simple reading of the transcripts suggests that Medlar was trying to get Cisneros to incriminate himself on tape, but Medlar says no. In fact, she says, she felt that Cisneros was blaming her for his political eclipse. She was simply trying to point out other skeletons in his closet.

She says now that she never saw $10,000 changing hands, and knew of this and the other alleged problems only from conversations she had had with Cisneros.

What is clear from the tapes, however, is that Cisneros was desperately worried that his financial arrangement with Medlar could sink his political hopes. This took on greater significance on Dec. 2, 1992, when he phoned Medlar to tell her about a 2½-hour conversation earlier in the day with Texas Gov. Ann Richards.

Clinton was planning to make Texas Sen. Lloyd Bentsen his treasury secretary, and Richards needed to appoint someone to fill the Senate slot—a Democrat who could subsequently win the seat in an open election. Cisneros was a natural choice, and Richards called him in to talk about it.

"I told her everything she needed to know to make the call," Cisneros said on the tapes, including the payments. "She's concerned about the money, and convinced that that's a killer." Cisneros said he was not particularly interested in the Senate anyway.

Ten days later things changed. Clinton picked Cisneros to be HUD secretary, and the vetting process had begun. First the transition team sent Webster Hubbell to talk to Cisneros, and Cisneros told Hubbell about the payments.

But he appeared to low-ball the numbers: "I told them, well it came to $10,000-$15,000 over a year," he said to Medlar. While it is clear that Cisneros never knew exactly how much he had paid, he later acknowledged much more than $15,000—closer to $50,000 per year.

Regardless of the amount, Cisneros came away from the vetting convinced that his appointment would be torpedoed: "I think Clinton will have problems," he told Medlar. "I feel like I'm not going to be nominated."

But, Medlar said, "If you had never said anything about it . . ."

"I couldn't afford to do that," he replied. There was too much risk that it would come out later, blind-siding the administration.

The transition team digested Hubbell's report, and approved the appointment, but Cisneros did not relax. With confirmation hearings coming up, the FBI was "crawling all over everything," he told Medlar in a conversation dated Jan. 4, 1993.

Cisneros was surprised that no one had been to see Medlar, and worried what she might tell the investigators. But, he said, "let me tell you something you're not going to believe, I trust you. . . . I trust you with my life."

"I wouldn't go that far," Medlar replied.

"Well, this is my life, it's on the line," he said. "If they [the FBI] knock me out, man, I am wiped."

But they didn't knock him out. The FBI never talked to Medlar, and the investigators decided the payments were "assistance, understandable under the circumstances," Cisneros told Medlar in mid-January. They had decided that Cisneros had paid Medlar $60,000, "virtually the truth," he said.

As a grand total for three years, however, $60,000 was not accurate, but Cisneros said in a recent interview that he understood the FBI meant $60,000 "a year." The Justice Department presumably is checking the record.

During 1993, Cisneros made three payments to Medlar totaling $55,000, then stopped, saying he could no longer afford them on his $148,400 Cabinet salary. Medlar said she has not spoken with Cisneros since late 1993.

John Paul's heart was rebuilt at a Philadelphia hospital in mid-1993, and he is making "a miraculous recovery," according to his father.

Cisneros, by all accounts, is an excellent HUD secretary—a powerful spokesman for the poor, a sound administrator and a skilled innovator.

Medlar says she is not faring well. Reclusive and nervous, she is depressed, worried about house payments and debts and desperately looking for work. "This is behind the scenes and nobody's going to care who I am," she said of her latest plans. "I'll do anything at this point that's not nudity or going on a talk show."

Now, Linda Medlar says, she is looking for work cleaning houses.

THE WALL STREET JOURNAL WEDNESDAY, OCTOBER 12, 1994

Nobel Game Theory

Congratulations are in order for the three winners of the Nobel Prize in economics whose names were announced yesterday in Stockholm. John C. Harsanyi of Berkeley, John F. Nash of Princeton and Reinhard Selten of the University of Bonn will share the $933,000 prize for their work on game theory.

Game theory, fathered 50 years ago by the great mathematician John von Neumann, has become an important tool for economists and businesses. Businesses apply it in sharpening their marketplace skills, drawing on available information, as a poker player does, to plot their next moves and guess the reaction of competitors. Economists use it in a broader sense to forecast interactions of all kinds. Strategists at Rand Corp. and elsewhere have applied it to anticipate the diplomatic and military moves of governments.

But there was another Nobel story yesterday. The Oslo newspaper Aftenposten, jumping the gun on Friday's announcement of the Nobel Peace Prize, reported that Yasser Arafat and Yitzhak Rabin have been selected as joint winners. It also reported that there were fireworks in the selection committee, with one member, Kare Kristiansen, threatening to resign over the Arafat choice. An emergency meeting to make a change, while highly unlikely, is not out of the question, Aftenposten said.

If Mr. Kristiansen was indeed upset, we can see his point. Yasser Arafat's Palestine Liberation Organization for years has pursued its ends through terrorism that claimed many innocent victims. Despite the historic accord of a year ago between Mr. Arafat and Mr. Rabin, some PLO members clearly are not yet reconciled to peace with Israel, as is evidenced by continued terrorist acts in which a PLO role is suspected.

But we should know by now that the Nobel committee does not restrict itself to the likes of Mother Teresa (1979) or Albert Schweitzer (1952). Nelson Mandela, whose followers in the African National Congress fought bloody battles with other black groups before emerging as the dominant black party in South Africa, was last year's co-winner with South African President Frederik W. de Klerk, head of a party that will forever be linked with Apartheid. Mikhail S. Gorbachev, who rose to the top of a party famed for dispatching its opponents to the Gulags, was the 1990 winner.

Nobel Peace Prizes go not only to good guys but also to tough guys who turn over a new leaf, or seem to. With Mr. Mandela and Mr. de Klerk there seems little doubt now that both are men of good will, whatever sins their followers have committed. Mr. Gorbachev at least had the good sense to allow the Soviet Union to die in relative peace. On the other hand, Le Duc Tho did the committee a favor in 1973 by spurning the prize. North Vietnam still had a lot of horrors to inflict on its people in the years after 1973.

Will there be a lasting peace between the PLO and Israel? One hopes so, but maybe here we should employ the economics winners. Princeton's John Nash in particular is known for the "Nash equilibrium." In greatly oversimplified terms, Nash equilibrium occurs in game theory when both players see no need to change their actions. Have Mr. Rabin and Mr. Arafat arrived at Nash equilibrium?

Maybe, for a time. But game theory's great value is that it addresses dynamic relationships, which applies to almost all interactions in politics and economics. If the peace prize committee wants to practice its own version of game theory, it is at least in step with the times.

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Game Theory Captures a Nobel

By PETER PASSELL

The 1994 Nobel Memorial Prize in Economic Science, a $930,000 award to be divided among three pioneers in the field of game theory, celebrates achievements in building the foundations for analyzing interactions among businesses, nations and even biological species.

But just as important, the prize awarded to John F. Nash of Princeton University, John C. Harsanyi of the University of California at Berkeley and Reinhard Selten of the University of Bonn acknowledges a sea change in economics that has occurred in the last two decades.

Economics has been a discipline dominated by the concept of perfect competition — competition among so many participants that no single buyer or seller need worry about the responses of others.

And perfect competition has proved to be a powerful idea, one that both predicted how free-market economies would evolve and that gave policy makers a reliable compass for figuring how best to encourage growth as well as a fair division of the economic pie.

But in a world of hostile takeovers, trade wars, and big government, classical economics is giving way to game theory, an approach that focuses on the give and take among "players." While classical economics works for the international market in wheat with thousands of buyers and sellers, it takes game theory to try to figure out how Safeway will change the price of English muffins if the A.& P. marks down bagels.

Game theory "opens up terrain for systematic thinking that was previously closed," said Paul Krugman of Stanford University, who has applied game theory to international trade.

John von Neumann and Oskar Morgenstern, economists at Princeton, invented the field. Their book published in 1944, "The Theory of Games and Economic Behavior," was the first to delve deeply into the likely consequences of strategic interactions, where all the actors must consider the potential for reaction. Both men are dead, and, therefore, not eligible for a Nobel prize.

John Nash, who received a Ph.D. from Princeton in 1950, is widely credited with laying out the formal mathematical principles of "games" — think of them as rivalries — in which everyone knows what everyone else knows and everyone behaves in his own self-interest.

"Nash is the point of departure" for all modern game theory, argues Avinash Dixit, an economist at Princeton and a co-author of "Thinking Strategically," the first guidepost for predicting the consequences of rivalries.

One glaring limitation of Dr. Nash's work is the assumption about perfect knowledge of rivals' motives and resources. Compaq does not know exactly what Apple is prepared to invest to build a better laptop computer. For that matter it does not even know whether other companies are preparing to jump into the market, and under what circumstances. And here the work of John Harsanyi, a Hungarian-born mathematical economist, filled the theoretical breech in the late 1960's.

"Harsanyi gave shape to the fog in real-world games," said Barry Nalebuff of School of Organization and Management at Yale. In the Harsanyi world, nothing need be known for certain as long as it is predictable in terms of chance. Thus when Compaq and Apple are figuring pricing strategies, they need only assign probabilities to the other's uncertain responses and counter-responses.

Another limitation to the Nash approach is that it did not offer insight into what would happen if more than one ending to the game was possible, even if the players acted consistently and in their own best interests. It does not stretch the imagination, for example, to think of the outbreak of World War I as only one of many plausible consequences to the diplomatic and military maneuvering in August 1914.

The German economist Reinhard Selten enriched the Nash model in 1965 by offering theories for discriminating between game outcomes that are reasonable and unreasonable. The mathematics is quite complex, but some of the underlying ideas are intuitive. For example, an outcome dependent on someone taking an unreasonable threat seriously (as in "buy my rug for $200 or I will kill your first-born child") may be discarded.

All this may seem as abstract and impractical as the theory of perfect competition — and for many years it was dismissed as just that. Nonetheless by the 1970's many economists were turning to game theory for inspiration, if only because they lacked answers to questions that turned on strategic behavior.

Thomas Schelling, an economist now at the University of Maryland who is in a class by himself in applied game theory, decades ago introduced ideas like the strategic value of brinkmanship. Indeed, some think he ranks with Dr. Nash as a founder of the field.

The great bulk of work by economists in game theory has been in an area where its insights had been most sorely missed: the organization of industry.

Robin Wells, an economist at the Stanford Business School, offers an example. Intel, the microprocessor giant, gave up an effective monopoly on the 86-series chip by allowing Advanced Micro Devices to share the technology. Intel, it seems, decided that computer makers would not lock themselves into a new microprocessor technology unless they were protected from future price-gouging by a monopolist. So by licensing another manufacturer, Intel successfully increased the demand for its own product.

Here, game theory explained corporate behavior that made no sense in nonstrategic terms. Game theorists have also been hired to create corporate strategy from scratch, most notably in the case of the Federal Communications Commission's auction of bands on the radio spectrum for use in wireless communications. "Every major bidder hired academic game theorists as consultants," said Andrew Schotter, an economist at New York University.

In the view of Mr. Schotter, however, the main value of game theory in formulating corporate strategy is more modest: getting executives to think carefully about response and counter-response in the marketplace. The purer gold, Mr. Schotter believes, will be mined by "institution builders" who must make rules to induce cooperative behavior. Corporations, for example, need to create incentives to minimize the conflict between their own interests and those of their employees.

What works in the private sector might work in the public sector: The F.C.C. did, in fact, hire game theorists to set the rules for the spectrum auction. And the potential is far broader — changing the tax code to induce voluntary compliance, for example, or designing monetary policy to gain the most credibility for the Federal Reserve as an inflation fighter with the least risk of setting off a recession.

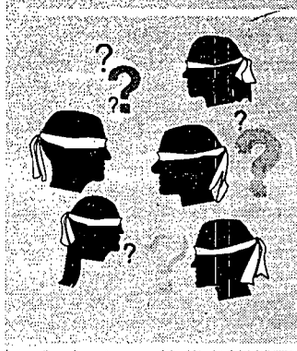
Game theory may not be as intellectually elegant as the model of pure competition found in every introductory textbook. Indeed, it is more a matrix for viewing the world than a full-blown theory. But Andrew Schotter believes the Nobel committee's decision to honor three founders was prescient. "Game theory," he says, "is the wave of the future."

The Real World of Game Theory

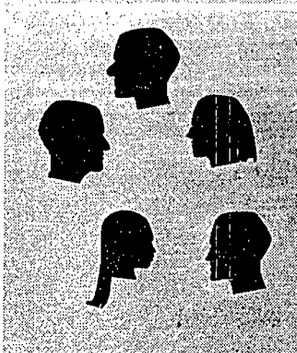
Game theory will undergo a practical demonstration in December when the Federal Communications Commission begins to auction radio licenses for new wirelesss personal communications services.

The F.C.C.'s goal is to raise the maximum amount of money, at least $10 billion, and will be using game theory to reach that target.

Game theory focuses on how "players" in economic "games" behave when to reach their goals, they have to predict how their opponents will react to their moves. The concepts developed by the Nobel prize winners were used by other game theorists to devise the auction rules. — *EDMUND ANDREWS*



Coping With the Winner's Curse
Like poker, auctions are a 'game of incomplete information.' Bidders have to speculate about both the value of the good being sold and their opponents' strategies. The great fear is the 'winner's curse' of paying too much. But if all bidders are overly cautious as a result, the auctioneer runs the risk that the bids will be below the value of the good being sold.



Maximizing Information
Game theory says bidders become more confident with more information, so the F.C.C. has designed the auctions to be as open as possible. Unlike most auctions, where goods are sold one after the other, bidding for all the F.C.C. licenses will occur simultaneously. By seeing how other licenses are being valued, and how their opponents are bidding, bidders can react without fear of paying too much. In such a case, the F.C.C. hopes, the proceeds should meet its

The New York Times

The give and take of economics is seen in the work of three winners.

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HOUSE PASSES BILL TO FOIL REDLINING INSURANCE PRACTICES

The House July 20 passed by voice vote a bill to foil discriminatory insurance practices, after beating back three contentious amendments that could have dissolved bipartisan support for the measure if approved.

HR 1188, the ''Anti-Redlining in Insurance Disclosure Act,'' is designed to expose insurance companies that refuse to make loans in high-risk, low-income, minority neighborhoods.

Backed by an array of consumer and insurance groups, it requires insurance firms to submit information yearly to the Department of Commerce on its car, homeowner, fire, and allied property insurance activities in some zip code areas within the 25 largest urban centers in the nation.

The House bill would require the biggest insurers in these areas, termed Metropolitan Statistical Areas, to disclose the number and premium price of all policies sold; the number of agents in the designated areas; the number of ''exposure units'' covered; and the number of units that were canceled or not renewed.

Insurers who fail to comply may be slapped with a $5,000 fine. However, the Commerce Department can exempt insurers in states with reporting laws similar to those in the bill.

These reporting requirements sunset in five years, but can be extended for another two years by Commerce. The department is directed to study and make public the data to determine the nature and extent of insurance availability. It also is required to study the feasibility of collecting commercial insurance data, and to establish a pilot data collection program within the five largest MSAs.

To the chagrin of some House Banking Committee members, these provisions are the same ones reported out of the Energy and Commerce Committee last September, following a heated jurisdictional dispute that spilled onto the House floor during debate on the bill.

In September, the Banking Committee reported its own insurance redlining bill, HR 1257, that would have required disclosure by census tract instead of zip code in 150 MSAs and 50 rural areas. It also gave the Department of Housing and Urban Development jurisdiction over the data. HUD would have reported directly back to House Banking.

But Energy and Commerce replaced House Banking's language with its own bill, HR 1188, last November. The measure, lauded by the insurance industry because it is considered less intrusive and burdensome than HR 1257, was later approved by the Rules Committee and reported out to the House floor for the vote.

''No wonder the insurance industry has no complaints,'' House Banking Chairman Henry Gonzalez (D-Texas), said at one point during floor debate. ''The Energy and Commerce Committee has kowtowed to all their demands.''

Members Kill Amendments

House Banking members tried to offer three amendments to HR 1188 that would have imposed stronger reporting requirements. But members from both sides of the aisle, including floor manager Cardiss Collins (D-Ill), warned that the adoption of any changes would mean the death of ''delicate'' bipartisan support for the bill as it was reported out by the Rules Committee.

In a move that may have ensured the bill's passage, members killed, by a vote of 97-333, a controversial amendment that offered some modified elements of HR 1257, the original House Banking bill that Energy and Commerce replaced with its own version, which is considered less harsh on the industry.

The amendment, sponsored by Reps. Lucille Roybal-Allard (D-Calif), Nydia Velazquez (D-NY), Thomas Barrett (D-Wisc), and Joe Kennedy (D-Mass), would have expanded HR 1188's reporting requirements by mandating disclosure from insurance companies in 75 of the nation's largest urban areas, versus the 25 areas required by the bill.

It would have made insurers report loss data in minority neighborhoods to verify claims that insurance is unavailable due to higher risk there. Supporters argued that regulators will not get the whole picture without this information.

WILLIAM BUCKLEY JR.

Prescience that prevailed

A word, before the holiday for this space.

It springs from reflections overheard since the appointment by Bill Clinton of his Cabinet and closest advisers. It is said of them that they are eclectic, that there are representatives there of several subdenominations of the Democratic faith. And it is true that Mr. Clinton's mobilization brings together men and women who have hoisted separate flags. All the more pointed his statement during one of the presidential debates that he alone would decide the economic path for the country, which statement elicited from President Bush his most spirited riposte of the season, "That's what worries me."

American conservatives, it is widely reported, are in anarchic confusion, left without a mission ever since the fall of communism and of dogmatic socialism. This is in part true, but not in the least surprising, for the reason that the enemies of conservatism (a) are immortal, and (b) hydra-headed. Under Marxism-Leninism, collectivist-liberalism reached its most refined form: a movement at once aggressive, atheistic, inhumane and philistine.

But when the Berlin Wall went down, that did not bring the end of these impulses. These are aspects of the human condition, and although the afflictions are individual, they gain great force when they combine in the engine of the state. The individual can be a great wastrel, and the damage is huge but also intimate. Whereas the state engaged in dissipation can do to itself what Argentina did to itself in our time. In 1939, Argentina's income per capita exceeded that of France.

Conservatives are fascinated by the evolution of the Clinton phenomenon. About it one can at this point certainly say this much: that its focus is statist, its appetite for power very large, and its concern for equal treatment under the law selective. Moreover, some of its concerns are fanatically pressed, and these — for instance, Sen. Al Gore on the environment — raise questions of balance, always a concern of the conservative.

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About this last mania one is struck by the words of Malcolm Ross, a scientist with the U.S. Geological Survey, when he addressed the graduating engineers at Virginia Polytechnic in May:

"We live in a nation with a short but dramatic history of high technical achievement on its way to becoming the most frightened nation on Earth — of radon in basements, Alar on apples, greenhouse gases, ozone holes, nuclear energy, ad nauseam. If we were to fund all of the so-called high-priority environmental projects proposed in the last few years so as to save us from these and other perceived terrors, the costs would certainly be greater than the nation's gross national product."

Conservatives are fascinated by the evolution of the Clinton phenomenon. About it one can at this point certainly say this much: that its focus is statist, its appetite for power very large, and its concern for equal treatment under the law selective. Moreover, some of its concerns are fanatically pressed.

How shall we achieve the environmental nirvana heralded by Al Gore in his book? By regulation. We should be headed in the contrary direction, toward deregulation, which is more merely than an administrative convenience; it is the agent of the wisdom of the marketplace.

One recalls a sentence from the reigning poet of the marketplace, George Gilder: "Rather than pushing decisions up through the hierarchy, the power of microelectronics pulls them remorselessly down to the individual. One free mind plus a workstation can outperform any array of regimented minds." Isn't this a fighting faith?

During the campaign, I noted that none of the most prominent candidates for high office was willing to suggest that what to do to help children whose mothers go to work during the day should be a concern other than that of the federal government. Alice Rivlin, the new deputy director of the Office of Management and Budget, recommends certain measures of devolution in her new book "Reviving the American Dream," but her emphasis is not central to the new Democratic administration.

In Edinburgh, Scotland, early in the past week, facing the possible dissolution of the Maastricht Treaty, the statesmen gathered there to rediscover the doctrine of subsidiarity, to appease those French, Danes and Brits who shuddered at the implications of centralized control by Brussels over wages, prices, welfare and what it is actually that can be sold as "cheese." Subsidiarity decrees that an enterprise that can be undertaken by the private sector should not be usurped by the public sector, and that no higher echelon of government should undertake what a lesser echelon is capable of handling.

It would be reassuring, even as it is unexpected, that Mr. Clinton will discover that part of Mrs. Rivlin that is most endearing. It was early in the year that the spirits of American conservatism were exhilarated by the eloquent epiphany of a long-standing socialist, Robert Heilbroner. He wrote:

"Capitalism has been as unmistakable a success as socialism has been a failure. Here is the part that's hard to swallow. It has been the Friedmans, Hayeks, von Miseses who have maintained that capitalism would flourish and that socialism would develop incurable ailments. All three have regarded capitalism as the 'natural' system of free men; all have maintained that left to its own devices capitalism would achieve material growth more successfully than any other system. From my samplings, I draw the following discomforting generalization: The farther to the right one looks, the more prescient has been the historical foresight; the farther to the left, the less so."

By these lights, President Clinton should be guided.

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TERRY EASTLAND

Clinton's civil rights transition

A month ago the Bush-appointed chairman of the Equal Employment Opportunity Commission, Evan Kemp, gave a speech in which he pointed out that Bill Clinton will have a hard, if not impossible, time of reconciling his commitment to "diversity" and his opposition to racial quotas and preferences. Mr. Kemp was ignored by the press, except The Washington Post. Not to worry, said an editorial, diversity doesn't require a resort to quotas but simply consideration of "forbidden factors." That is to say: Diversity requires racial and sexual preferences.

Mr. Clinton cannot reconcile his campaign commitments any more than The Post can. But it is fair to ask whether his presidency now has a single commitment, to "diversity," achievable through every means including preferences.

Soon after the election, Mr. Clinton smoked a peace pipe with Jesse Jackson, who proceeded to endorse the president-elect's effort to make his Cabinet "look like America." Some day this enterprise may be all that's remembered about this transition, not only because one will be told ad infinitum about the percentages of this and that group that were appointed, but also because one will recall some truly silly moments. Such as when Mr. Clinton was so im-

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EASTLAND

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pressed by the gender (female) of his nominee to head the Environmental Protection Agency, that he mistakenly introduced her as the first woman ever to run EPA.

But Mr. Clinton's keen pursuit of a "Look-Like-America" Cabinet (Memo to Bill: Try harder: There are at least 106 ethnic groups in the nation's work force) is not the best indicator of where his administration will go on the serious issues raised by Mr. Kemp. For that, a layman — a docile press has not done its job — must check out the individuals being named to the various transition teams involved with legal policy, starting with Emma Jordan, assigned to the Attorney General's Office.

Miss Jordan, president of the Association of American Law Schools, recently unburdened herself on "race-conscious law school admissions policies." In the November AALS newsletter, she celebrates "diversity" as she attacks the Department of Education's opposition to race-exclusive scholarships and its Title VI enforcement requiring the University of California at Berkeley law school to modify a blatant quota admissions scheme.

Her defense of Berkeley is eye-catching, given Mr. Clinton's campaign protestations against quotas. The law school reserved 23 percent to 27 percent of the seats in each entering class for "black, Chicano, Asian-American, and Native American" students. The files of all applicants of these "minority" descriptions were separated from the rest and comparisons made only within each group. Could there be any better example of a quota? If Bill Clinton agrees with Professor Jordan on the legality and wisdom of Berkeley's admissions policy, nothing is left of his anti-quota position.

Miss Jordan ties her defense of Berkeley's practice to a more general argument denying that standardized test scores equate with merit. She wants to de-emphasize such scores in the admissions process. To what extent, she does not say, as she concludes her letter, opaquely: "The time has come for a careful assessment of whether the convenience of standardized testing is now outweighed by the stigmatizing effect of equating merit and high test scores." And if it is outweighed, how is a law school — or any other professional school — to admit students, other than by the numbers?

If people are policy, Emma Jordan is an early indicator of Clinton civil rights policy, especially in regard to higher education. Among the many other civil rights issues on which Mr. Clinton has not pronounced but his people — both the transition types and the actual officeholders — will, are these:

How will the Clinton Justice Department and EEOC enforce Title VII of the Civil Rights Act? Will they seek to impose, as the Carter administration did, racial preferences upon employers? Will they employ theories of discrimination that increase the pressure on employers to resort to racial preferences?

How will the Clinton Labor Department enforce Executive Order 11246, which imposes "affirmative action" upon government contractors? Will Robert Reich pursue "diversity," or will he challenge a program that Mr. Kemp rightly called in his speech "the father of quotas and group preferences."? And what of the Department's "race-norming," a practice made illegal by the Civil Rights Act of 1991 but which Miss Jordan's theory of test scores would seem to embrace? Will it be revived?

And what of legislation, especially likely to emanate more frequently from the new, more Democratic, Congress, requiring reservation of a percentage of federal contracts for officially designated minorities? Will this be praised as "diversity" legislation, or will Mr. Clinton see it for what it is — an obvious quota — and object?

The answers to all of these question will be evident, soon enough. But if others in the transition think like Emma Jordan, it is easy to guess the general shape of civil rights policy in the Clinton administration, and to conclude that Bill Clinton never had any intention of opposing his own party's infatuation with counting by race and sex.

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DATE: 7-4-94
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DEMOGRAPHICS

JENNIFER, JESSICA, SHARYN, AND MICHAEL BERGIN WANT FORMS TO CALL THEM "MULTIRACIAL"

SHOULD THE CENSUS BE LESS BLACK AND WHITE?

Interracial couples and many ethnic groups say more categories are needed

For months, first-generation Irish American Michael E. Bergin dropped off his blonde, blue-eyed daughter, Jessica, at her second-grade classroom in suburban Atlanta every morning. Then his wife, Sharyn Doanes-Bergin, who is African American, showed up at a school party last Christmas. Said a teacher to Jessica: "I didn't know you were black." In people's minds, "Jessica has to be one or the other—black or white," says Doanes-Bergin. "My children want to be able to claim both their parents, but the government is always forcing them to make a choice."

To avoid that dilemma, the Bergins want federal and state agencies to adopt a new racial category: "multiracial." And they're not the only ones looking for official recognition. Under growing pressure to create a new palette for America's rainbow of races, the Office of Management & Budget will launch a round of hearings, beginning July 7, to reexamine the government's 17-year-old scheme for dividing the U.S. into four races (white, black, Asian, and American Indian) and two ethnic groups (Hispanic and non-Hispanic).

The idea of a demographic overhaul is meeting resistance from traditional civil rights groups, which fear that breaking out new ethnic groups would cost them political strength. And business worries that a proliferation of categories could be a nightmare for companies that must meet affirmative-action guidelines.

But advocates of the change argue that new categories are needed, both to reflect America's changing demographics and to help new groups win more official attention and aid. Arab Americans want a new racial listing for people of Middle Eastern origin. Hispanics want the Census Bureau to break their 25.7 million population into at least six subgroups. Native Hawaiians argue over whether to throw their quarter-million numbers in with Pacific Islanders or Native Americans.

Multiracial Americans, whose numbers are fueled by a surge in interracial marriages, may have the best chance of gaining a spot in the federal bureaucracy. Three states now require a multiracial box on school forms, and Georgia will recognize the category on all state-mandated paperwork starting July 1. As states send their multiracial data to the feds, "we're going to build the pressure on Washington to act," says Susan Graham, who heads Atlanta-based Project RACE (Reclassify All Children Equally).

DILUTED CLOUT? That worries civil rights groups. The Census Bureau estimates that 75% of the country's 32.7 million African Americans have ancestors of other races. Not all would list themselves as multiracial—but even a 10% switch would reverberate through legislative-redistricting plans, school-desegregation schemes, and fair-housing and -lending enforcement. "Any reduction in the size of the African American population would be counterproductive," says Billy J. Tidwell, research director for the National Urban League.

Business, too, is cool to change. Marketers might welcome new census data that give them more information on groups with distinctive buying habits. But a proliferation of racial categories would be a nightmare for companies that must do complicated statistical analyses of their workforce's racial and ethnic makeup to meet affirmative-action guidelines. A multiracial category would pose special problems: "If my figures show I need multiracial engineers, where do I go to recruit them?" asks Lorence L. Kessler, an attorney at the business-backed Equal Employment Advisory Council in Washington.

NEW RULES COULD BE A NIGHTMARE FOR COMPANIES MEETING AFFIRMATIVE-ACTION GUIDELINES

The OMB hopes to decide whether to overhaul its categories by early 1995. Business opposition could still sink the move, as it did when the OMB tried a similar but less ambitious overhaul in 1988. Ethnic infighting, too, could undermine the drive. But the groups pressing for change are getting a receptive hearing in Washington—and that may mean that Jessica Bergin and her sister Jennifer will no longer have to choose between their parents.

By Mike McNamee in Washington

6/5

The Washington Post

DATE: 5-4-94
PAGE: C-1

HUNGERING FOR JUSTICE

Randall Robinson, Weakened But Unwavering in His Fast

By Laura Blumenfeld
Washington Post Staff Writer

A rapper, a priest, a wife and a lawmaker gather around his bed.

"It's indefensible," says the priest.

"These people are being hacked to death," says the wife.

"And their bodies fed to pigs," says the congresswoman.

"Maybe MTV could do something," the rap musician says.

Randall Robinson nods, rubs his eyes and breathes. He lies on a white cotton blanket in a white concrete basement. It is Day 16 of his hunger strike. He runs his hand over the braids of his 4-year-old daughter, Khalea.

"Excuse me," says a doctor named James Davis. "Randall, you need some fluid."

Robinson gets up. He is 6 feet 5 and it takes a while. He is wearing jeans, sweat socks and a soft gray turtleneck. He follows Davis down a basement hallway. The air tastes like metal, and pipes crisscross the ceiling and gurgle in the walls. Robinson, 52, lives here now. He has rented a bed and plugged in his shaver below the Washington headquarters of TransAfrica, a lobbying group for Africa and the Caribbean, where he is executive director.

Now he has stopped eating. As he will put it: "Why has the president refused to treat Haitian refugees like the others? Race drives this policy as much as antisemitism in the State Department drove Roosevelt to turn around ships carrying Jews. I simply know I could never live with myself if I didn't try."

The man who was arrested seven times leading America's anti-apartheid movement now is putting his life on the line, he says. His only condition for ending the fast: Give Haitian refugees a hearing instead of turning them back at sea. People were more aware of South Africa, he says. With Haiti, he has to take more drastic action.

He reaches a sink and drinks two glasses of water. He pants. His pulse is 108, the highest rate yet.

"You need some rest," says the doctor.

Khalea runs down the hall, whipping the air with a Haitian flag.

"Doctor," the girl calls out. "Is he doing okay?"

Davis smiles and disappears behind a closing door.

Robinson goes back to his bed.

It goes on like this, the guests, the telephone.

There's a call from South Africa.

"Hey, Jesse," says Robinson. He is doubled over in his bed. "Thank you, Jesse, that's very kind." Jesse Jackson is in South Africa for the elections.

"Give Mandela my regards," Robinson says. "Explain to everyone why I can't make it. Take care, buddy. Bye."

Robinson clicks down the phone and sighs.

The visitors hug him and peel off one by one: the rapper, KRS-One; the pastor, James Healy; the congresswoman, Maxine Waters; Robinson's wife, Hazel; and Khalea.

"Give me an hour or so," he promises. "I'll revive."

He lies back. His head touches the pillow like a boat going down.

Day 17

Before the fast, most mornings, he ate a warm blueberry muffin, buttered. This morning he has tomato juice and water. He pulls a dusty scale from under his bed. Total loss: 10 pounds. If it weren't for all the liquids it could be a lot more.

Robinson is having trouble hooking words into a logical train. The sentences are thoughtful but slow. His voice is even but soft. He sinks into an armchair. The light is dead basement light, no windows.

"It's better that way," he says. "I don't see the spring."

"Hey, guy," a man says, appearing at the door.

Robinson brightens, rises, claps his friend on the back. Earl Graves, the publisher of Black Enterprise magazine, looks around, surveys the pile of clothes in the middle of the room, and teases, "Did you put your

cont'd.

clean underwear out here 'cause you want your mother to know you're changing it?"

They laugh and Graves takes off his jacket.

"Which is the toughest part of the day?" Graves asks.

"There's no distinction between day and night, week and weekend. It all runs together," Robinson says.

The men talk about South Africa, about the tough winter, about investment prospects. They have known each other for 10 years, vacation together with their families at the beach.

"Did I tell you I got another grandchild?" Graves says.

"Yeah," says Robinson.

"That's four now," says Graves.

There are pauses, a thumbing through for topics.

"This is such a soluble problem, Earl," Robinson says.

"We got to get Clinton to set this right," Graves says, upbeat. "So we can go to Virginia to the shore."

Morning ticks into afternoon and the guest book upstairs fills with names, locals and out-of-towners, celebrities and nobodies. "Thank you, Randall, for speaking the truth," one woman writes. They bring him videos, "Dracula" and "An Affair to Remember." They bring him books on fasting, Chopin tapes. Clutching juice or flowers or pictures of Haitians with their faces sliced in half, the guests all spiral down the stairs for one thing—to see this uncompromising man in [illegible]ity of compromise.

Day 18

Friday morning the doctor visits him. He is the only one.

"This is the worst of all days," says the doctor, James Davis.

Robinson hadn't slept at all. His joints ached. Pains rippled his chest. He hasn't eaten for nearly three weeks, drinking about eight glasses of water and three quarts of tomato juice daily. His protein levels are below normal, body temperature down, mildly dehydrated. He has dropped 12 pounds, to 182. He phoned the doctor, first thing.

"He's wiped out," Davis says. "He's sighing quite a bit."

Davis plans to run an EKG to check his patient's heart. There are few known cases of people dying during a hunger strike, but the thought is always there.

Day 19

Hazel Robinson comes every day and sits with her husband, stroking his face, cracking jokes, trying to get back to that feeling when they were just Hazel and Randall. Today, this is hard. It is hard to ignore how thickly this breaths come.

She is a strong, private woman, unused to showing her pain. She has round cheeks and a mouth made for smiles. Now, the mouth is pulling taut.

The telephone rings, and the voice on the other end says: "Mommy."

Day 20

Sundays are unusual for guests. But then, these guests are unusual.

Around 4 p.m., with no one else in sight, two men turn the brass handle into Robinson's world. They are messengers from Bill Clinton: Samuel Berger, the deputy national security adviser, and Morton Halperin, a special assistant to the president for national security. They, too, want to understand why Robinson is doing this. They want to see him face to face.

"It's more personal and more direct," Halperin explains later.

When Clinton was running for president, he promised to give Haitian refugees safe harbor: "I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti." But after his election, Clinton changed his mind. U.S. military vessels have been intercepting them at sea, sending them back to Haiti, where they may face torture or death. Robinson wants the president to keep his pledge.

But a White House official says the policy is necessary to keep thousands of Haitians from making a trip many would not survive. Clinton and his advisers argue that the majority of these Haitians are economic rather than political refugees.

After an hour of discussion, the Clinton men climb back up to the fresh air.

Halperin has only this to say: "He seemed committed and sincere and dedicated."

Day 21

"He's moving slow, he's talking slow," says Eleanor Clift of Newsweek, emerging with a notebook full of quotes. "The wonderful thing is I can take everything down. I don't have to rely on my tape recorder."

Robinson is confined to bed. He no longer stands to welcome guests. The phone is nestled next to him. A line dents his belt where he moved the buckle over a notch. The broad arm gestures are reduced to finger taps. His hands look gray. His eyes are dim.

"I don't know what's going to happen," he says.

But he knows why it began: He was appalled by reports from Haiti of murder, rape and mutilation. Meetings and letters were having no impact on Clinton.

"He has no moral core," Robinson says. "The president took comfort thinking the American people wouldn't care. I believe the people would care."

He talks for a while, gulping, sometimes stuttering. When a word eludes him, his body shifts slightly as if trying to shake it free.

"I have no sense of whether I will succeed," he says.

Day 22

Somebody tells him the good news: another sailboat, 86 Haitians. But this time, the Haitians are taken to a detention center near Miami. They will be held until a review of their political asylum claims.

"This is just one boat," Robinson says, his voice choked. Clinton may have talked tough today, saying he's considering military action. But until the administration changes its policy, the black banner outside TransAfrica will fly. And he will fast.

He says, "Every life has a value."

The Washington Post

DATE: 5/4/94
PAGE: A25

William Raspberry

At Least Rescue Haiti's Refugees

Armed thugs have taken over the building, ousting the legitimate manager and holding the residents hostage. What should the neighbors do?

Call the police, of course. But what if the police deny jurisdiction or simply won't come?

Cut off the utilities, block delivery vans and try to starve the thugs out? But the thugs naturally will have first call on whatever food remains in the building and also on whatever goods can be sneaked past the blockade. By the time the thugs are good and hungry, the hostages will have starved to death.

Put together a raiding party to storm the building, even at the risk of killing a few hostages? But these are neighbors, not police officers. Are you certain that mere neighbors ought to get that deeply involved in somebody else's fight?

Use bullhorns to threaten the thugs in the hope that they'll decide to give up without a struggle? But why should they yield to mere threats—particularly when there's reason to doubt there will be any follow-through?

Look the other way and hope for the best? Sure, it's possible to ignore the ousted manager's demands that he be escorted back to his post; his contract is about up, anyway. But what of the anguished screams of the hostages—and the occasional body tossed from an upstairs window?

The analogy isn't perfect, but it comes close enough to describing the Clinton administration's unhappy options for dealing with Haiti. It is not easy to decide what a neighbor ought to do, especially if physical intervention means a more or less permanent responsibility for running the place.

"If you're going to be in trouble no matter what you do, you may as well do the right thing."

But one thing no neighbor would do: capture whatever hostages manage to escape and return them to the thugs.

And that, alas, is the only clear and operative policy of the Clinton administration. There are announcements that America's Haiti policy is being reconsidered and that the embargo will be tightened. There are leaked suggestions that an armed invasion is in the offing, whether or not its purpose will be to restore the deposed President Aristide. But the one thing that is actually happening is the return of the escapees.

This is the policy Randall Robinson's hunger strike, now in its 23rd day, is calculated to change. The mystery is why President Clinton should find it so difficult to reverse a policy he roundly denounced as inhumane when it was the policy of his predecessor.

Robinson, executive director of the lobby group TransAfrica, would like to see Aristide returned to power. But his liquids-only fast has a far more modest objective: to get the administration to grant refugee hearings to those Haitians who flee the island to seek asylum here or elsewhere.

The administration's position is that the asylum seekers should present themselves at the American Embassy in Haiti, apply for refugee status and, if it is granted, leave Haiti in orderly fashion. Fleeing first presents America with a messy situation that would either require hearings at sea (in order to separate the political refugees from the merely economic ones) or else necessitate the temporary admission of all those Haitians plucked out of the water by the U.S. Coast Guard. Once they'd been taken in, however, the options would be to keep them in detention, admit them (perhaps in huge numbers) or return them to the thugs that ousted Aristide. Each option entails its own political disadvantages, besides which, as both the Clinton and Bush administrations kept pointing out, gracious treatment of the refugees would certainly tempt new hundreds of refugees.

I again offer Clinton the advice I first offered him during the Lani Guinier contretemps: If you're going to be in trouble no matter what you do, you may as well do the right thing.

I don't know what the right thing is with regard to the overall Haiti policy, but on the question of the refugees it seems easy enough. Change the policy of sending desperate refugees back to the situation they've risked their lives to escape because they forgot to say, "May I?"

I think it is changing, even if Clinton can't figure out how to announce it. Since Robinson's strike, two groups of Haitians have been intercepted by the Coast Guard—some 400 on April 22 and another 97 yesterday. Both, according to the administration, involved "unique" situations. But both groups were taken to American shores.

If that's the new policy, why not announce it? It's the right thing to do, and it could save the life of a good man.

The New York Times

DATE: 5-4-9
PAGE: A-23

In America

BOB HERBERT

Fasting for Haiti

President Clinton's comment yesterday seemed unequivocal. "It's time for them to go," he said, referring to the military leaders who have put the torch to democracy in Haiti.

The Administration is making a big (if belated) push for tougher United Nations sanctions against the outlaw regime of Lieut. Gen. Raoul Cédras, and reports are rife that Mr. Clinton is seriously considering some form of military intervention if intensified sanctions don't work.

Its carrot strategy in shambles, the Administration appears to be reaching for a fair-sized stick.

Meanwhile, Randall Robinson, the 52-year-old executive director of TransAfrica, remains on a hunger strike, which is now in its fourth week and has brought increased attention to the Administration's policy on Haiti. Mr. Robinson has long urged stepped-up efforts to oust the military regime, but his immediate goal is much narrower. He wants Bill Clinton to end the United States' loathsome practice of capturing Haitian refugees on the high seas and returning them to their homeland.

Mr. Robinson does not believe he is asking a great deal. He would like the Administration to treat Haitians the same as anyone else seeking political asylum in the United States. A fair hearing would be sufficient. If the Administration would just grant a hearing to the Haitian refugees to determine if they have a credible claim to political asylum, Mr. Robinson would return enthusiastically to a diet of solid food.

It would have to be a real hearing, not some sham shipboard interview, and not some farcical proceeding conducted in a U.S. Government office in Haiti after the refugees have been hauled back home.

"All we need to do is undertake a hearing to separate the economic refugees from the political refugees," said Mr. Robinson. "I end this fast when we give the people a hearing."

The difference in the way the United States handles fleeing Haitians and fleeing Cubans encountered at sea is instructive. The Haitians are halted and forced to board a Coast Guard vessel. The Haitian boats are burned and sunk and the refugees are taken right back to Haiti. The Cubans, on the other hand, are embraced. Often they are met by a United States Government vessel, which provides whatever assistance is necessary to get the refugees to Florida.

"They literally bring the boats in," said Ira Kurzban, a Miami lawyer who has represented both Haitians and Cubans. "They'll hear there's a Cuban raft out near the Bahamas and they'll go out and rescue it and bring them to the United States."

With Cubans, the United States saves the boat and welcomes the people. With Haitians, we destroy the boat and banish the people.

The forced return of refugees to places where they could suffer persecution is prohibited by both United Nations treaty and United States law. But technically, according to an Alice-in-Wonderland ruling by the U.S. Supreme Court, the United States policy of capturing Haitians at sea and returning them to Haiti is legal.

The Court ruled that neither the U.N. treaty nor the Federal immigration law applied to refugees on the high seas.

An activist protests U.S. policy on refugees.

If the Haitians could somehow reach the United States, they would be entitled to a hearing on their request for political asylum. But the Coast Guard is out there to make sure they never get that opportunity.

The Supreme Court, in its ruling last June, acknowledged that the forced repatriation of refugees at sea "may even violate the spirit" of the United Nations treaty. The Court went as far as to suggest that the drafters of the treaty had not specifically protected refugees at sea because they "may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape."

Randall Robinson has lost a dozen pounds or so, and if the Administration doesn't change its policy regarding Haitian refugees he will lose a dozen more. He doesn't want to die but he believes the moral issue here is big enough to risk dying for. The United States, he believes, cannot become a barrier to liberty, a nation that sends the seekers of democracy back into the inferno. □

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THE CIVIL RIGHTS ACT OF 1991

(Continued from front)

Disorder in the Court (with N. Dorsen (1974)), and the four-volume treatise *The Justices of the U.S. Supreme Court, 1789-1969* (1970), winner of the 1970 Scribes Award for best book on a legal subject.

Merrick T. Rossein is Professor of Law at The City University of New York Law School at Queens College, where he teaches courses in Administrative Law, Civil Rights, and Employment Discrimination. Professor Rossein is the author of a comprehensive treatise on employment discrimination, entitled *Employment Discrimination Law and Litigation* (Clark Boardman Callaghan, 1990). He has served as Commissioner of the N.Y.C. Equal Employment Practices Commission since 1991.

Mark Snyderman is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher, specializing in labor and employment law. Mr. Snyderman received a Ph.D. in Psychology from Harvard University in 1983, and a J.D. from the University of Chicago in 1989. He joined Gibson, Dunn in 1991 following clerkships with Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit and Justice Sandra Day O'Connor of the United States Supreme Court. Mr. Snyderman is a member of the bars of the District of Columbia and the State of California.

Steven H. Steinglass is a Professor of Law at Cleveland-Marshall College of Law, where he teaches courses in Civil Procedure, Federal Jurisdiction, and Section 1983 Litigation. Professor Steinglass is a frequent lecturer at continuing legal education programs on civil rights litigation, and he is the author of *Section 1983 Litigation in State Courts* (Clark Boardman Callaghan). He also argued *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Felder v. Casey*, 487 U.S. 131 (1988), in the United States Supreme Court.

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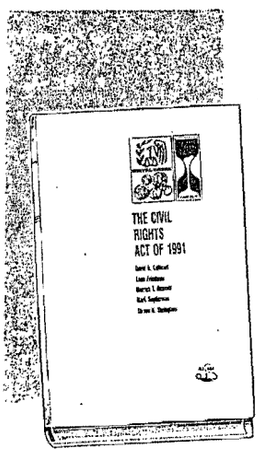

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The Civil Rights Act of 1991

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Enacted to negate decisions of the U.S. Supreme Court that were seen as weakening important protections against employment discrimination, the Civil Rights Act of 1991 makes the following important changes to the law:

- It gives plaintiffs under Title VII and the ADA the right to trial by jury and allows recovery of both compensatory and punitive damages.
- It shifts the burden of proof in a disparate impact case from the plaintiff to the defendant once a disproportionate adverse effect on a protected group has been demonstrated.
- It makes defendants liable for declaratory or injunctive relief as well as attorney's fees and costs if race, color, sex, or national origin was "a motivating factor" for any employment practice.
- It prohibits discrimination in the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."
- It limits challenges to affirmative action consent decrees whose provisions adversely effect certain individuals or groups.
- It prohibits "race norming" of employment test scores.
- It protects American citizens working in foreign countries for American companies or American-controlled foreign companies.
- It extends the time period for challenging an intentionally discriminatory seniority system under Title VII.
- It allows a plaintiff to recover expert fees under Title VII, the ADA, and Section 1981.

This comprehensive ALI-ABA book, **The Civil Rights Act of 1991**, discusses these topics and many others, including the all-important question whether the Act applies retroactively to cases filed and acts committed *before* the Act was passed or merely prospectively.

The text also discusses the important roles played by state courts and state law in employment discrimination legislation and the particular importance of the Judicial Improvements Act of 1990, which provides a statutory foundation for pendent claim, pendent party, and ancillary jurisdiction and severely limits the formerly broad discretion of federal courts to decline to exercise supplemental jurisdiction over pendent state law claims.

To assist the practitioner in researching discrimination cases, extensive appendixes contain the text of the Civil Rights Act of 1991; the complete Congressional floor debates; the text of the Civil Rights Act of 1990, as vetoed by President Bush; and H.R. 1, the forerunner of the Civil Rights Act, as passed by the House of Representatives.

A Table of Cases, a Table of Statutes, Rules, and Regulations, and an Index of Subjects are also provided.

1993, hardbound, 469 pages, Order No. B696, $95.00 plus $5.25 postage/handling; Special Introductory Price through 11/30/93: $79.95 plus $5.25

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