

NEW PERSPECTIVES

U.S. COMMISSION ON CIVIL RIGHTS FALL 1984



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Since the Moynihan Report . . .
by Blanche Bernstein

**Baby Doe: Public Judgments
or Private Choices?**
*By James F. Blumstein and David
Randolph Smith and by
Naomi Munson*

Seniority: Not For Whites Only
by Arch Puddington

Editorial

A New Civil Rights Issue

This issue of *New Perspectives* considers for the first time some of the basic questions surrounding the "Baby Doe" controversy—namely, who should hold the power and bear the responsibility for granting or denying medical treatment to infants born with severe mental and/or physical disabilities. It has sparked a heated debate between civil rights activists, public interest groups and policy makers trying to define the line between private choices and public responsibilities for the nondiscriminatory care of the newly born. Medical progress in sustaining the lives of imperiled infants has created new challenges to accepted legal and moral standards, forcing the courts and legislatures to confront decisions that, until recently, did not have to be made. The Commission's interest in this difficult issue stems directly from the question of whether or not certain decisions affecting the care provided to handicapped infants constitute an act of discrimination against them or a denial of their equal protection under the Constitution.

In her article, Naomi Munson asserts that the denial of treatment is an overt and intentional act of discrimination, one equivalent to infanticide. Consequently, government intervention on behalf of the child is, in her opinion, a just and necessary application of federal law, regardless of the infant's condition or the desires of parents and their doctors. Professors Blumstein and Smith, on the other hand, believe that the selective treatment of imperiled infants does not necessarily violate civil rights or criminal statutes. They argue that parents and physicians, who must bear the primary responsibility for the "best interests of the child," be allowed some discretionary autonomy in such circumstances.

The two articles in this issue of *New Perspectives* represent the first of several inquiries the Commission plans to make into the "Baby Doe" debate. In coming months, the Commission will sponsor a public hearing in order to further investigate what promises to be one of the most controversial and debated new issues in civil rights for the coming years. ☐

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NEW PERSPECTIVES

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Since the MOYNIHAN Report...

by Blanche Bernstein

In March 1965, Daniel Patrick Moynihan, then head of the Office of Planning and Research in the U.S. Department of Labor, authored a report entitled *The Negro Family: The Case for National Action*.^{*} It is fascinating to reread it almost 20 years later; it is also instructive to review its major thesis, the reaction to it, developments since its publication, and consider again the case for national action.

Moynihan warmly welcomed the establishment of the President's Committee on Equal Opportunity, the Manpower Development and Training Act of 1962, the Economic Opportunity Act of 1964, and the Civil Rights Act of 1964, all efforts to improve the economic position of blacks, abolish poverty, and eliminate legal and formal discrimination against blacks. The report also eloquently and sympathetically describes in the chapter on the "Roots of the Problem" the ill effects of the period of slavery, the frequently high levels of unemployment and low wages, and inferior education on the structure and well-being of the black family.

But as Moynihan studied the economic and demographic trends evident in available data for 1940–1963, he foresaw a serious clash between the newly enunciated black goals of achieving not just equal opportunity but equal results—in the sense of a comparable distribution of income, education etc. as between whites and nonwhites—and what he referred to as the crumbling

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**The report itself does not indicate any individual authorship, only the government agency which issued it, but is well known as the Moynihan Report and he took the brunt of the attack against it. Beginning with the second half of the 1960s the word "Negro" became a term of opprobrium and "black" came into use. In this article, I follow current usage, unless I am quoting.*

of the black family. He noted that the white family "has achieved a high degree of stability" and is maintaining it, but in contrast, "the family structure of lower class Negroes is highly unstable, and in many urban centers is approaching complete breakdown." He added that "so long as this situation persists, the cycle of poverty and disadvantage will continue to repeat itself" and he called for national action "directed to a new kind of national goal: the establishment of a stable Negro family structure."

Did the report bring about a widespread public recognition of the role of family stability in improving the economic and social situation of blacks and a plan for national action? Quite the contrary: it elicited a sustained, vociferous attack from black leaders and many liberal white opinion makers. Moynihan was labeled racist and reactionary, as was anyone else who argued similarly in the ensuing years. And this despite the fact that some outstanding blacks had already written, or were to write in a similar vein: among others, E. Franklin Frazier in 1939 and Andrew Brimmer, then a member of the Federal Reserve Board, who in 1970, while noting the significant economic progress made by blacks during the 1960s, pointed out the deepening schism in the black community evident "above all in the dramatic deterioration in the position of Negro families headed by a female." Despite those and some other voices raised in defense of the Moynihan thesis, the overwhelming reaction in terms of its influence on public policy was one of rejection. Some defended early child bearing on the grounds that black girls were more mature than whites and even plans to expand family planning services to blacks were labeled genocide.

As in the period prior to the passage of equal opportunity and civil rights legislation, the focus of attention of black leaders and others remained on denial of civil rights, discrimination, unemployment and low wages. At the 1980 White House Conference on Families and Children, though President Carter began with the notion of strengthening the intact family, an HEW task force urged a more "neutral" model as the liberal goal; the task force won. As a result, the White House Conference degenerated into a conference on ways of aiding any and all types of families rather than focussing on the intact family. Indeed, the intact family got short shrift in the proceedings, and little consideration, if any, was given to possible programs for the prevention of family break-up or the nonformation of families.

During the almost 20 years since the publication of the Moynihan Report, has the economic and social situation of blacks improved and what do the data which became available in this period tell us about the current situation of the black family and its impact on their well-being?

Between 1940 and 1960-64 (the period examined in the Report), Moynihan found that the rate of black births out-of-wedlock had risen from 17 to 24 percent of all live births; the comparable figures for whites was from two to three percent. Between 1950 and 1960 the ratio of female-headed black families rose from 18 to 21 percent; among whites the figure was unchanged at about nine percent. The big increase in the indices of the deterioration of the black family were yet to come. At the beginning of the 1980s, the proportion of black families headed

by women had reached 11 percent, almost a doubling of the ratio in two decades. It should be noted that the increase in families headed by a woman as a result of divorce, desertion, or nonformation of a family is evident among all income and ethnic groups, but among whites it reached 12 percent and among Hispanics, 20 percent, as compared to 41 percent among blacks.

Does family structure make a difference in terms of the family's standard of living? Indeed it does. In general, it takes about 1.3 wage earners per four-person family to achieve the Bureau of Labor Statistics lower-level standard of living (\$15,323 in 1981 prices—later figures have not yet been published), 1.7 for the moderate level (\$24,407) and two wage earners for the higher level (\$38,060). The female-headed family is clearly at a serious disadvantage with limited opportunities for moving up the economic ladder. The data on the family characteristics of those in poverty are even more compelling. In 1982, only eight percent of two-parent families were poor compared to 36 percent of female-headed families. Among intact families with two wage earners, only five percent of white families, nine percent of black families, and 12 percent of Hispanic families were poor.

Between 1969 and 1975 the number of poor black families headed by women soared by 64 percent, accounting for all the increases in the number of poor black families.

During the 1960s, the black/white income ratio improved—from 54 percent in 1959 to 63 percent in 1968—though the differential remained substantial. But the differential widened again in the 1970s. According to an analysis published in 1981, "a fundamental reason for the deterioration of the black/white income ratio between 1970 and 1976 is the substantially faster rate of growth of female-headed families among blacks than among whites. In fact, if the patterns of family composition that existed in 1970 had been present in 1978, the black/white income gap would have been narrowed in that period by five percentage points. If one went back to 1960, the gain would have been greater."¹ And it was Dr. Robert Hill of the National Urban League who pointed out that the number of poor black families rose by 19 percent between 1969 and 1975 due to the sharp rise of black families headed by women. While the number of poor black families headed by men fell by 34 percent—the number of poor black families headed by women soared by 64 percent, accounting for all the increase in the number of poor black families.

Perhaps the most vulnerable of the female-headed families are those headed by a teenager or a mother who was a teenager when she had her first child. A study published by the Urban Institute found that women who were teenagers at the birth of their first child account for more than half of total AFDC expenditures in the country and comprise an astounding 71 percent of all AFDC mothers under 30 years of age.²

Teenage mothers under 16 incur the most long-term disadvantages. They exhibit a high dropout rate from school, have

larger families, less opportunity for employment and lower earnings when they do work. Further, they are more likely to find themselves and their children trapped in long-term poverty with its harmful consequences for health, housing, learning, and social development.

Reviewing trends from 1940 to 1960, Moynihan already expressed concern about the fact that black women were having babies at younger ages but the problem then was still of modest dimension. It was not until the '60s and '70s that teenage pregnancy grew to enormous proportions and became the single most important cause of long-term poverty.

A few figures are necessary to delineate the growth and size of the problem, as well as its impact on the well-being of the major ethnic communities. The number of teenage out-of-wedlock births rose from 91,700 in 1960 to 262,500 in 1979; if one counts only those under 17, the increase is from 48,300 to 129,500. While out-of-wedlock teenage births have increased more rapidly among whites than among blacks, the rate of 15 births to unmarried teenagers per 1,000 white births is still far below the rate of 87 for blacks. In 1971, of all females 15–19 years old, eight percent conceived a child; by 1979 the figure had risen to 12 percent, or one out of nine teenagers. Births have also increased among children 13–15 years old. Some 1.3 million children in this country live with teenage mothers; an additional 1.6 million children under five years of age live with mothers who were teenagers when they gave birth.

Perhaps even more revealing than the data on births to teenagers are the trends in teenage sexual activity and its outcome. Between 1971 and 1979, while the number of teenagers 15 to 19 rose by six percent, the number who were sexually active almost doubled; from 2.5 to 4.7 million. Among whites the figure went from 41 percent to 65 percent; among blacks, from 78 percent to 89 percent. Further, the number of teenagers who conceived a child was about double the number who gave birth out-of-wedlock. In other words, about half the conceptions terminated in an abortion or miscarriage, mainly the former.

The acceleration of family breakup and teenage pregnancy were reflected not only in a tripling of the welfare caseload during the 1960s and further substantial increases until the mid-1970s, but in the increase in crime, juvenile delinquency, and drug use, with the youngsters on welfare disproportionately represented in all those areas as well as among school dropouts. The "tangle of pathology" has become ever more tangled.

One cannot put all the blame for this dismaying picture on unemployment, or even on discrimination, though racial discrimination has not yet been eliminated from our society. Moynihan traced a positive correlation between black unemployment rates and family instability for the two decades he studied but he noted that this connection appeared to have been broken in 1962–3; at that time he could only wonder whether it was the beginning of a trend. It was. From the early '60s to the early '70s unemployment declined from an overall rate of about six percent to three to four percent and though unemployment for blacks remained higher than that for whites, it too declined. We were in fact in a tight labor market.

And yet, these were the very years of the explosion in the

welfare caseload and the increasing evidence of social pathology. What was overlooked during this period of turbulence—when there was concern about the continued existence of poverty within the country; evidence of continuing though diminishing discrimination against blacks and other minorities; and violent reaction, as reflected in riots in many cities, to what was perceived as past and current injustices—was the enormous growth in female-headed families because of family break-up mainly as a result of teenage child-bearing. For more than two decades, the problem was largely ignored by the black community. In *A Statistical Overview of Black America* published by the National Urban League in December, 1982, the family structure explanation of the economic disorder which had befallen blacks was discounted with the statement that "People are not poor because they are female and household heads; they are poor because they do not have jobs or adequate income." And the subject of black family structure was taboo among a significant section of the white community as well. Only recently has this changed.

Perhaps even more revealing than the data on births to teenagers are the trends in teenagers sexual activity and its outcome.

At first only individual black voices were heard—William Raspberry in the *Washington Post*, Robert Curvin in the *New York Times*, William Haskins of the National Urban League, among others. They were saying publicly that in effect the blacks needed to concern themselves about the structure of the black family and particularly with teenage pregnancy. The major breakthrough came with the publication of a pamphlet in June, 1983 entitled *A Policy Framework for Racial Justice*, issued by 30 liberal black leaders (known as The Tarrytown Group) and members of the Black Leadership Forum. These leaders list the following as the most urgent problems to be tackled to bring poor blacks into the mainstream: progress in the economy, *the condition of the black family* (my emphasis) and educational opportunity. They add that unless major efforts are made quickly "The condition of a large portion of the black population will deteriorate beyond the point where any program of action can be effective." On the subject of teenagers they say "Teenagers and young men and women need to be encouraged to pursue training, work, and personal development while they delay pregnancy and family formation" and further that "For young people, there is a special need for sex education and education about the importance of *delaying sex, pregnancy and marriage* (my emphasis)."

The issuance of *A Policy Framework for Racial Justice* served to galvanize the black community to action on a national scale. It was followed within a year by a Black Family Summit Conference called by the National Association for the Advancement of Colored People and the National Urban League. The news release issued at the end of the conference, May 5, 1984, contains language not heard for many years; for example John Jacobs, President of NUL warned that "some of our problems may be



self-inflicted, that we may have allowed our just anger at what America has done to obscure our own need for self-discipline and strengthened community values.”

Hitherto, the foundations approached these issues very cautiously, concerned that they might be considered racist.

If one reads through the summary recommendations of each of the ten task forces established at the conference, it is not difficult to be critical of its laundry list aspect or the lack of specificity of many of the recommendations. What is more important, however, is the recognition of the nature of the problem and the beginning effort to outline a strategy for dealing with it, a strategy which clearly must stress the economic and social advantages of family stability and the behavior necessary to achieve it and not rest solely on an appeal to morality.

The public recognition by black leaders of the responsibility of the black community for improvement in the structure of the black family and for persuading teenagers and young people, boys and girls alike, to postpone sexual activity and pregnancy has also made it easier for the white-sponsored foundations and other philanthropic organizations to assist in developing and funding necessary programs, and also to evaluate the effectiveness of different approaches. Hitherto, the foundations approached these issues very cautiously, concerned that they might be considered racist.

The importance of evaluation of the effectiveness of programs cannot be overemphasized. The belated recognition of the causes of poverty among blacks in the 1960s and onward—not to be confused with the causes of poverty in the 1930s or earlier—have resulted in a problem of enormous size and complexity. No one knows exactly how to promote family stability and persuade teenage boys and girls to postpone sexual activity after two decades of permissiveness and the erosion of earlier held values. Efforts to develop programs of any major scope are no more than two years old and some remain statements of intention rather than programs which can be implemented beginning next month. One of the early ones—Teaching Teens to Say No—began on a demonstration basis in Cleveland and Atlanta and

now being carried out on a large scale in the schools in Atlanta, is being evaluated by the Ford Foundation. Governor Mario Cuomo of New York has initiated a program on adolescent pregnancy which is, however, still largely on the drawing board and the New York City public school system has within recent months initiated an updated sex education curriculum dealing with teenage pregnancy among other issues. Other efforts are underway in various cities sponsored by various foundations. What is needed is a national central repository of information on what programs are being tried, and which show promise of success under what circumstances, so that scarce resources are not wasted on reinventing the wheel, especially wheels that don't turn.

Government at all levels should join in the effort to strengthen the black family in appropriate ways. The federal government might well fund the national depository of information suggested above. Washington and the states should focus more attention and resources on advancing the educational achievement of the children in welfare families since there is a positive correlation between progress in schools and delaying sexual activity. The names and addresses of the roughly 8 million children in the nation on welfare are known to local welfare departments. But little is done to provide extra assistance to them in the early years of schooling though it is known that they are disproportionately represented among school dropouts. If the effort is not made in the early grades we will continue to face a costly remediation effort—as we are now—in the high schools and even the colleges, as we seek with only limited success to prepare them for the existing opportunities in the world of work.

It is urgent that the effort to postpone teenage sexual activity succeed if we are to avoid the heavy costs to society of teenage child bearing and the even heavier costs to the teenager, her child, and the black community, as well as the costs of continuing conflict between blacks, whites and other ethnic groups over the distribution of the nation's product. Moynihan was right. ☐

End Notes

¹Steven H. Sandell, *Family Income in the 1970's: The Demographics of Black/White Differences*, Technical Analysis Paper No. 23, U.S. Dept. of Health and Human Services, December 1981, Office of Planning and Evaluation, Office of Income Security Policy Evaluation.

²Kristin A. Moore and Martha F. Burt, *Private Crisis, Public Cost: Policy Perspective on Teen Age Child Bearing*, Urban Institute, Washington, D.C., 1981.

SENIORITY: *Not For Whites Only*

by Arch Puddington

The Supreme Court's June decision in the Memphis Firefighters case appears to have gone a long way towards settling the question of whether seniority systems can be abrogated in order to protect the jobs of minorities or women. By affirming the validity of seniority systems which do not, on their face, discriminate against black workers, the Court at once has achieved several things. First, it has upheld the legitimacy of one of the most fundamental institutions of industrial relations. Second, the Court has resolved a controversy bearing a far greater potential for interracial strife than the various issues raised by either the *Bakke* or *Weber* reverse discrimination cases. Finally, the ruling in the Memphis case (*Firefighters Local Union No. 1784 v. Stotts*) suggests that, in the future, the Court will be somewhat more reluctant to approve the judicially directed restructuring of America's social, educational, or economic institutions in order to promote affirmative action goals.

The modification of seniority has occupied a place on the agenda of many civil rights organizations for some time now. The predominant attitude was probably best reflected in a 1977 report issued by the U.S. Commission on Civil Rights. Entitled *Last Hired, First Fired: Minorities and Civil Rights*, this report was strongly endorsed by most civil rights organizations, women's groups, and affirmative action specialists. The report concluded that seniority systems, while by-and-large racially neutral on their face, represented a major barrier to the economic advancement of minorities and women. Remedial action was called for, and in the report's most controversial proposal, the Commission urged the Equal Employment Opportunity Commission to issue guidelines "based on the principle, explicitly stated, that all seniority-based layoff policies should be invalid as they apply to any work force that does not mirror the relevant labor market and [whose] composition cannot be explained successfully by the employer." In other words, if the percentage of minority or women workers at a particular company or government agency does not at least equal the percentage of minority or women workers in the local labor force, then the seniority principle could not by itself determine who was to

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be laid off or rehired.

In lieu of seniority, the Commission recommended the adoption of various kinds of work-sharing arrangements. But in those cases where agreement on such alternatives could not be reached through the collective bargaining process, the Commission came down four-square for government initiatives to modify traditional seniority practices. Among the specific ideas proposed by the Commission were inverse seniority, with senior workers accepting layoffs, with compensation, and the establishment of separate seniority lists for blacks, women and white males. Under the latter scheme, layoffs (and rehires) would be apportioned on a ratio basis. Thus if women comprised 20 percent of the workforce, no more than 20 percent of those fired could be women.

That the sweeping changes urged by the Commission were never taken up by the EEOC or other federal agencies having jurisdiction over civil rights enforcement was not due to any principled opposition to altering seniority by government fiat. The principal constraints rather were the general reluctance of the courts to modify seniority systems (except in those cases where specific workers could demonstrate that they had been victimized by a seniority provision formulated with the intent to discriminate) and because of strong political opposition, especially from non-minority male workers and their trade unions. Labor's position is hardly surprising, given the fact that seniority provisions are contained in most collective bargaining agreements and in the *overwhelming* number of contracts in the industrial sector. It is worth noting, however, that seniority is not merely one item in the long list of policies and practices gained by workers through collective bargaining. For the labor movement—and indeed for most American workers—seniority is central to the attainment of fair treatment at the workplace, an institutional guarantee against prejudice, arbitrariness, favoritism or whim in the determination of some of the most basic issues of the workplace.

The most important effect of seniority was to give individuals a property right to their job.

With the notable exception of the railroad industry, seniority systems were practically unknown in American industry prior to the 1930s. In most industries, management, usually the foreman, had the sole power over who was hired, laid off, rehired, transferred or promoted. In practice, this often meant that employees did not know from one day to the next whether there would be work for them at the factory. During campaigns to organize workers in the basic industries, the promise that union representation would lead to the introduction of seniority often proved to be the crucial point in persuading a worker to support unionization. The history of organizing efforts in the electrical industry suggests the high degree to which workers valued seniority. Prior to the 1930s, the major corporations of the industry—General Electric, Westinghouse, etc.—had been highly successful in maintaining a non-union work force. Moreover, by carefully

erecting a paternalistic framework of policies, benefits, and recreational opportunities, the industry accomplished its objective without resorting to the strong-arm tactics which marked steel, auto and other industries. In this whole scheme of things, the granting of seniority by the companies played a central role. So much so, in fact, that when, with the onset of the Depression, the companies withdrew seniority rights, workers in the industry who had never before displayed particular sympathy for unions suddenly became enthusiastic union partisans, and the industry giants were almost completely organized.

From the point of view of trade union leaders, seniority represents something more than a mechanism to regularize layoffs, rehires and promotion policies. Inherent in the implementation of seniority systems is an important participatory dimension. Union members discussed, debated, and ultimately decided how seniority was to be applied at a particular workplace. In some cases, plant-wide systems were selected; in others, different seniority lists for the various job categories won the support of the majority. In the process, a worker's sense of union loyalty was solidified, as was his feeling that he was now participating in a form of industrial democracy previously unknown in the U.S.

The widespread adoption of seniority also produced a dramatic change in the relationship between workers and management. Where previously management had enjoyed absolute control over all aspects of personnel policy, now employers found their latitude substantially constricted. Indeed, while corporations ultimately acquiesced in the seniority demands of unions, they did so reluctantly, arguing that seniority had a detrimental effect on productivity and efficiency. It is, in fact, undeniable that the acceptance of seniority as a normal part of industrial relations entails a trade-off between efficiency and equity. Nor does seniority guarantee absolute justice. Under seniority provisions, there are occasions when less senior but more competent workers will be laid off or denied promotion. Since man has never devised a system providing total justice, the fairest solution is the one which appeals to the greatest number. In this context, seniority has been repeatedly and overwhelmingly ratified by American workers as the most equitable way of selecting between competing claims for jobs. For labor unions, seniority has the added benefit of leading to an enhancement of solidarity, as members are no longer set one against the other in a ceaseless rivalry over work.

As a number of observers have pointed out, the most important effect of seniority was to give individual workers a property right to their job. Given the stake which workers have in protecting the seniority principle, the demand to modify or weaken seniority in the name of affirmative action represents a more controversial proposal than hiring new employees on the basis of racial or sexual preference. Under quota hiring formulas those adversely affected are white males who are *prospective* jobholders; they are penalized insofar as an employment opportunity has been postponed or lost altogether. The modifications of seniority, on the other hand, penalizes workers who *already* hold a particular job and who may have held that job for many years.

Like many aspects of American life, seniority systems in the past were sometimes written so as to directly discriminate against black and occasionally women workers. In some industries, the

railroads in particular, collective bargaining contracts often called for separate seniority lists for black and white workers, a device which effectively prevented blacks from competing for better-paying jobs. Seniority systems in other industries, while not overtly discriminatory, had the clear effect of inhibiting the integration of the higher skilled and better paid crafts within industrial enterprises.

Today, of course, the overtly discriminatory effects of seniority are no longer at issue. Those instances where seniority reinforced segregated job patterns have been effectively dealt with by federal law, the courts, and through voluntary agreements reached by unions, employers and minority workers. Under debate, rather, is whether even when formulated in a racially and sexually neutral way, seniority unfairly penalizes minority and women workers by inhibiting their entrance into jobs traditionally dominated by white males. As late arrivals in many of the occupations where seniority clauses are in force, it is contended, blacks and women are particularly vulnerable to downturns in the economy. In this view, seniority as an institution reinforces the current effects of past discrimination. Those favoring government or court directed alterations in seniority believe that the normal functioning of seniority systems should be precluded until that time in the future when minorities and women achieve representation throughout the various segments of the job market roughly equal to their presence in the population. Thus the 1977 Civil Rights Commission report does not limit its recommendations to those instances where individual workers are the victims of bias or even where employers have been found guilty of a pattern of racial or sexual exclusion. The Commission instead asked that seniority clauses be adjusted in each and every case where women or minority workers were "underrepresented," an idea which, if seriously implemented, would lead to the penalization of literally thousands of white male workers bearing no responsibility for past or present injustices done to blacks or women.

The series of events which led to the *Stotts* case began in 1974, when the city of Memphis entered into a consent agreement under which it pledged to increase minority hiring in the fire department. Three years later, in 1977, Carl Stotts, a black captain in the department, filed a class action suit in federal court charging the city with racial discrimination in its hiring and promotion policies. In 1980, the suit was settled under terms of a consent decree overseen by the United States District Court for the Western District of Tennessee. The consent agreement called for the city to immediately hire 13 named blacks and to provide back pay for 81 blacks already serving in the fire department. On a broader level, the city agreed to a long-term goal of increasing the percentage of black firefighters to a level approximately equal to the proportion of blacks in the Memphis labor market, which at the time was over 30 percent. To this end, the city established a goal of filling 50 percent of job vacancies in the fire department with qualified black applicants. As an additional goal, the city agreed to try to fill 20 percent of promotions with black applicants. Here it should be stressed that the city's record on minority hiring since the original 1974 consent decree demonstrated that genuine efforts were being made to increase the number of black fire-

fighters. Between 1974 and 1980, when the second consent decree was formulated, 56 percent of new hires by the fire department were black and the percentage of blacks in the department had increased from between three and four percent to over 11 percent.

In May, 1981, the city announced that due to a budget crisis a number of members of the fire department were to be laid off, and that the layoffs would proceed under the traditional "last in, first out" provision of the city's collective bargaining contract with the firefighters' union. The consent decree which had established the guidelines for the fire department's affirmative action program included no mention of seniority as the basis for determining layoffs. Nonetheless, the respondents in the original suit requested that the federal district court issue a restraining order forbidding the layoff of any black firefighters. The court subsequently directed the city to fashion a plan under which layoffs would proceed in such a way as not to reduce the percentage of minority workers in a series of job categories. Ultimately, the city laid off 24 firefighters, three of whom were black. Had strict seniority practices obtained, six of the laid off firefighters would have been black. Thus the court order penalized three white firefighters and an unspecified number of whites who were demoted in rank under seniority bumping privileges. The district court's decision was later upheld on appeal by the Court of Appeals for the Sixth Circuit.

In overturning the lower court rulings, the Supreme Court relied largely on the non-discriminatory provisions of the Civil Rights Act of 1964, as well as that law's clear statement protecting seniority systems (providing they are not implemented with a discriminatory intent). Section 703(h) declared that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin."

If a 1977 Civil Rights Commission report were implemented, thousands of white male workers without responsibility for injustices to blacks or women would be penalized.

In addition to citing the 1964 law itself, Justice White, who wrote the decision, devoted considerable attention to the bill's legislative history, focusing on the repeated pledges of its major sponsors that Title VII would not lead to quota systems, reverse discrimination or the invalidation of such traditional practices as seniority. Responding to charges leveled by southern senators opposed to the bill that Title VII would inevitably result in court-ordered preferential treatment for minorities, Senator Hubert Humphrey had this to say about the limits on a court's remedial powers:

No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not

ered, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . fir(ing) of employees in order to meet a racial "quota" or to achieve a certain racial balance . . . That bugaboo had been brought up a dozen times; but is nonexistent.

Senator Humphrey was not the only civil rights champion at pains to dispel the bugaboo of preferential treatment. A memorandum entered into the Congressional Record by Title VII's legislative leaders, Senators Joseph Clark and Clifford Case,

racial quotas or the hiring, reinstatement, admission to membership, or payment of back pay to anyone who is not discriminated against in violation of this title."

Senators Humphrey, Clark, Case and the many other advocates of racial equality who addressed the question of racial fairness did not do so in order to obscure the implications of Title VII. There can be no doubt that these sentiments reflected the true intent of Title VII's supporters. Moreover, had the bill's sponsors said that Title VII would or might lead to court-ordered quotas or other forms of racial preference, including the abrogation of seniority, or in any way equivocated on this question, popular support for Title VII would have dissolved, and its defeat in Congress assured.



made clear that it was Congress' intention to preclude special benefits for those not victimized by direct discrimination: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]." A similar statement was issued by the Republican sponsors in the House. It declared: ". . . a federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the reinstatement on acceptance of a union member. But Title VII does not permit the ordering of racial quotas in business or unions." Likewise, the key Senate sponsors explained in a bipartisan newsletter that "under Title VII, not even a Court . . . could order

To those who justify quotas, the issue of congressional intent is irrelevant. Some civil rights specialists, in fact, reject the very concept of "innocent parties" in the debate over bias at the workplace. As expressed by several affirmative action enforcement officials during hearings on seniority and civil rights conducted in 1976, all Americans, or at least all white males, are guilty insofar as all have somehow benefited from the past exclusion of minorities and women.

It is inevitable that the notion of universal white guilt produced remedial prescriptions which clash directly with the principle of individual rights. Furthermore, the idea that layoffs should be apportioned on a quota basis, with separate seniority lists similar to those once utilized to discriminate *against* blacks,

rests on a highly selective interpretation of the history of black involvement in the economy during the past two decades. That history is one of substantial change in the hiring patterns in private corporations and government agencies throughout the country. In job after job, policies which excluded blacks or discouraged their participation were abolished, to be replaced by policies of racial neutrality or, in many instances, affirmative action formulas of various kinds. As barriers to black employment were removed it has become increasingly difficult to argue that those blacks who had entered the labor force since 1964 continue to meet the same obstacles which confronted previous generations of black workers. And while blacks continued to suffer the residual effects of past segregation, they were also the



beneficiaries of an array of government initiatives aimed at advancing minority job opportunities. These measures included quotas, the overhauling of job tests, special training efforts, and various other initiatives, voluntary and otherwise, which together comprise the government's affirmative action offensive. Given the unprecedented dimensions of the affirmative action campaign, the insistence that blacks, not to mention women, *in addition* should be allowed to displace more experienced workers on the seniority roster raises a troubling question: Where does the logic of quotas end? For in fact if one were to take the quota concept to its logical conclusion, one might well argue that the quickest and most expedient way to resolve economic inequality is to simply take jobs away from white males and hand them to blacks and women.

The seniority debate also reveals a number of fallacious ideas about the American economy. There is, to begin with, the illusion that the economic plight of the black community can be resolved through the intense application of radical social engineering. The fact that black jobless rates rose steadily during the 1970s, the period when the enforcement of affirmative action goals was most rigorously pursued, should indicate just how flawed this notion is. One further detects among many civil rights

advocates a perception of the economy as a static, terminally stagnant entity, where a laid-off minority or woman worker will automatically join the ranks of the permanently unemployed. In fact many, perhaps most, laid-off workers are able to reclaim their jobs relatively quickly; this occurred in the Memphis fire-fighters case. As for the general shape of the economy, a period of change and transition is clearly underway. Change, of course, entails disruptions—serious ones for blacks, who tend to be concentrated in precisely those industries which are suffering the most far-reaching dislocations. On the other hand, today's economy can hardly be characterized as a zero sum game, with someone's gain necessitating someone else's loss. The most useful strategy for blacks is to exploit the new economic opportunities which are opening up while at the same time participating in the development of policies designed to revitalize industrial America. These, and not affirmative action, are the issues which will determine the future economic prospects of blacks.

Exploiting new economic opportunity, not affirmative action, will determine the future economic progress of blacks.

This is not to say that nothing should or can be done to ameliorate the problems of workers in industries suffering regular and often widespread layoffs. In many cases, alternatives to seniority-based layoffs should be seriously considered. Among potential benefits, a decision by a union to adopt a work sharing scheme would enhance union cohesion and solidarity. The determination of how layoffs are to be apportioned, however, should be made first by the affected workers and second by labor and management through collective bargaining, and not by government or judicial order.

Ultimately, the debate over seniority boils down to the question of how much an important socioeconomic institution should be compelled to change to advance racial and sexual advancement when that institution is not in itself discriminatory. Seniority is for millions of American workers a cherished economic right. The labor movement won recognition for seniority as a consequence of some of the most difficult organizing campaigns in American industrial history. Thousands of *black* workers are protected by seniority provisions, and a constantly growing number of women workers enjoy its protection as well. In a few years, many black and women workers who, as late arrivals, face job uncertainty today because of their low ranking on the seniority lists, will defend seniority as a fundamental right of employment. And while seniority may pose temporary problems for certain classes of workers, it provides a significant measure of equity for others—older workers who tend to have families and the responsibilities which go with them, and even veteran workers who through the years may have lost some of their earlier skills. The principles which undergird seniority need not be immutable. But if changes are to be made, they should come at the initiative of workers and their unions, and not by direction of a government bureaucracy or the courts. ▣

**Baby Doe:
Public Judgments or
Private Choices?**

A Jurisdictional Approach

by James F. Blumstein and
David Randolph Smith

We are fortunate to live in a time and place where wondrous advances in medicine and science offer the promise of prolonged life. In the case of certain imperiled newborns, however—those with a serious birth defect or an acute acquired illness—the progress of neonatal medicine and technology has created a profound moral dilemma. Parents and physicians confront a tragic choice. To postpone death and thereby prolong a life may result in great suffering and impose staggering burdens and costs on the child, on the child's family and on society. Not to authorize or provide a treatment that might be technologically available, albeit at high financial and psychological cost, places decisionmakers in the uncomfortable position of determining who shall live and what the value of a life—or, as some would have it, a quality-adjusted life—will be. The ethical quandry is like that of Dr. Ridgeon in Shaw's play *The Doctor's Dilemma*.^{*} Thanks to science and technology, we can now often "do something" whereas physicians previously, with only limited therapeutic resources, could only "stand there."¹

As in the case of many technological advances, fundamental social and ethical dilemmas have emerged in the wake of scientific progress. Now that we can "do something," we must go about formulating understandings of what we can or must do, under what circumstances, and at whose say so. Is greater involvement by courts or by government regulation warranted or appropriate? What approach should health care providers and courts adopt to treatment decisions involving imperiled infants? How should that approach recognize the presumptive responsibility and autonomy of parents to manage the care and treatment of their children? Our conclusion is that, except where parents abuse their authority, private moral dilemmas about the treatment of imperiled infants should remain family affairs, not

matters of public policy.

For a private ethical dilemma to become an issue of public policy, there must be a legitimate source of government concern. The development of the video cassette recording technology (VCR) enhances the ability of a family to enjoy certain forms of entertainment. Yet, whether a family chooses to or is able to purchase a VCR is not deemed a question of public concern. Nor is a family's choice of one of the competing formats over another a matter that excites the concern of the policy analysis community.

The fundamental—and often overlooked—question is this: Why does government have an interest in the decision concerning the treatment of imperiled infants whereas it has no particular interest in a family's decision about purchasing VCRs? The obviousness of the answer—that human life is at risk in one but not the other situation—should not deter us from asking the question, because thinking about the response helps in the formulation of an approach to the policy problem.

Historically and constitutionally, families are presumed to have primary responsibility for the upbringing of their children. Within broad parameters, families are free to choose their method of childrearing and to pick the values and aspirations transmitted to their offspring.

Yet, in certain circumstances society has determined that the

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^{*} *Having discovered a new treatment for tuberculosis, Dr. Ridgeon explains to a prospective patient's wife that he cannot treat her tubercular husband without pangs to his conscience:*

I have at the hospital ten tuberculosis patients whose lives I believe I can save. . . . Wait a moment. Try to think of those ten patients as shipwrecked men on a raft—a raft that is barely large enough to save them—that will not support one more. Another head bobs up through the wave at the side. Another man begs to be taken aboard. He implores the captain of the raft to save him. But the captain can only do that by pushing one of his ten off the raft and drowning him to make room for the new comer. That is what you are asking me to do.

G. B. Shaw, *The Doctor's Dilemma*, in *Collected Plays With Their Prefaces*, Vol. III (1975), pp. 354–55.

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**Baby Doe:
Public Judgments or
Private Choices?**

A Moral Issue

by Naomi Munson

In California, a nine-year-old is diagnosed as suffering from a heart defect. Untreated, the boy will grow progressively weaker and shorter of breath, and he will end his days—at around 30—confined to a wheelchair. A relatively minor operation will not only increase the child's life expectancy, it will also allow him to live a physically normal life, free to play and move around with ease. The parents refuse surgery.

In Indiana, a baby is born with a defective esophagus. The food he eats cannot reach his stomach, and thus provides no nourishment for his body. Surgery—the standard, the *only*, treatment in such cases—can correct the defect and eliminate the problem. Without the operation, the infant will starve to death, although he can be sustained temporarily by intravenous feeding. The parents refuse not only the surgery but the intravenous feeding as well.

In New York, a baby girl is born with an open spinal column and an excess of fluid on the brain. The spine can be closed surgically, and a shunt can be implanted in the brain to drain the fluid and prevent brain damage. With the surgery, the child will live. Without it, she will succumb eventually—probably before her second birthday—to infection, most likely spinal meningitis. The parents refuse surgery.

While these parents felt the world could survive very nicely without their children, others disagreed, and each of the children became the focus of heated legal battles.

The California case was fought all the way through the state courts, which consistently supported the parents' refusal to authorize surgery. It went even so far as the U.S. Supreme Court—which refused to intervene—and back to the local level where, ultimately, the friends of the child were successful in their quest to save his life. Today, after nearly a decade of litigation, the boy is no longer in his parent's custody. He has had his operation and is living a full life.

The infant in Indiana, since immortalized as Baby Doe, was not so fortunate; a baby simply cannot survive for very long with no nourishment of any kind. Before his case went beyond the Indiana Supreme Court—which supported the parents—Baby Doe died, in the hospital, with doctors and nurses looking on, of starvation.

The New York baby, better known as Baby Jane Doe, has also had her day in court. The New York State Supreme Court found in her favor, but both its Appellate Division and the New York State Court of Appeals reversed that ruling.

In the meantime, Baby Jane's spine closed spontaneously; and her parents subsequently authorized the implantation of a shunt. She should, in short—although she almost certainly sustained brain damage during the months when fluid was allowed to accumulate—live longer than originally scheduled.

What can it be that prompts parents knowingly and willingly to consign their children to a lingering or an agonizing death; or that prompts virtually an entire judicial system to accommodate such parents? One is, of course tempted to turn to Freud and Moses, and both could undoubtedly shed great light on the question. Obviously, however, more is involved here than any individual perversion—emotional or spiritual. For beyond the cruelty of their parents and the callousness of the courts, these children are united by one sad and simple bond: they are damaged goods.

The nine-year-old in California had more than a defective heart; he had (and has) Down's syndrome. He has, in short, a broad face with slanted and widely spaced eyes; he has short and oddly splayed fingers; and he is retarded.

Baby Doe was also a Down's syndrome child. Had he lived, he would have borne some physical resemblance to the California boy; and he would also have been retarded.

Baby Jane Doe's condition is spina bifida, and the prognosis in her case is by no means clear-cut. At worst (barring, that is, death by infection), she will be bedridden and retarded. At best, she will be incontinent, drive a car, go to college, and walk with the

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A Jurisdictional Approach

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legal system must come to the protection of young people—against themselves, against outsiders, and, in some cases, against parents.

Society protects children, for example, against the adverse consequences of making poor contractual decisions by declaring that contracts made by minors are unenforceable by adults. Minors are treated differently than adults in the criminal justice system. Child labor laws protect children against themselves, but also from the prospect of exploitation by venal parents. The same is true of compulsory school attendance laws. Laws on child abuse and termination of parental rights are the clearest manifestations of society's determination that children, at times, need legal protection against their parents.

Within broad parameters, determination of what is in the child's and the family's best interests is left to the parents. Where legitimate disagreements exist, family pluralism and autonomy are preserved. Only in areas in which a broad social consensus exists has family autonomy been circumscribed.

Where governmental intrusion on family autonomy exists, it stems from a public concern for the welfare of the child. But such intrusion, especially where family decisionmaking autonomy is displaced, occurs only for very important reasons and only where there is strong reason to believe that parental authority has been abused or is subject to abuse.

Therefore, the case for intrusion on family autonomy—especially coercive intrusion—typically rests on two components, one positive and the other negative: A perceived affirmative societal obligation to provide succor and support to children; and a duty to protect the defenseless from inappropriate adult overreaching. To justify public intrusion, there must be some strong evidence that families are very likely to act or have acted adversely to the child's interests.

In the area of treating imperiled infants, the scope of public obligation has yet to be defined. There is no constitutional right to receive medical treatment, but that issue has never been litigated in the context of an infant. Prisoners, who are dependent on government, do have some constitutional claim to treatment. But the existence and scope of any constitutional right to treatment on the part of imperiled infants is certainly questionable and murky.

In addition, there is no reason to believe that, as a rule, families are unreliable in making treatment decisions for their children. Thus, as a matter of general presumption, families of imperiled infants, together with their advisors (physicians, other health providers, religious leaders, individual and institutional

ethicists) should be permitted to retain their decisionmaking autonomy unless, in a particular case, it can be demonstrated clearly and convincingly that parents are acting against their child's interest as reflected by a general consensus of community conduct. When parental conduct no longer conforms to the expectations of the behavior of a fiduciary, and when parents act outside the realm of consensually acceptable norms, it is appropriate for government to intrude, in its role of protecting the defenseless from inappropriate parental overreaching. Only then should public policy attempt to deal directly with the substantive decisions about the appropriate range of treatment for imperiled persons.

Genuine tragic choice decisions should remain in the realm of private initiative so that public choices about sensitive value issues need not be confronted overtly and decided monolithically. Because government is constrained by a devotion to the symbolic imperative that life is beyond price, public decisionmaking is skewed by concerns about symbolic issues and is susceptible to "symbolic blackmail." The humanitarian self-image of society may be at stake, and we may be willing to expend considerable sums of money, ostensibly to save a life, but also to preserve a valuable myth. For these reasons, an effort should be made to distance government from direct, head-on confrontations with tragic choice issues.

Where parental autonomy must be breached, however, and a person is drawn within the perimeter of public responsibility, an effort should be made to reestablish the authority of non-governmental decisionmaking entities—e.g., by delegating responsibility to non-governmental decisionmakers such as physicians or to institutional entities such as hospital committees.

Neonatal intensive care units in hospitals throughout the United States routinely encounter severely impaired infants with major illnesses or defects. Non-treatment of imperiled infants occurs with some frequency.

The realities of neonatal care have provoked a sharp debate concerning the propriety of decisions not to authorize or provide medical or surgical treatment or nutritional sustenance to imperiled infants. For some, prolonging the life of all non-dying infants at all costs (to the infant, to the family and to society) is a categorical imperative with virtually no exceptions. "Right-to-life" organizations argue that parental decisions not to treat imperiled infants constitute "infanticide."

A number of cases challenging parental treatment decisions have been initiated by members of right-to-life organizations. In

Coquille, Oregon, a member of Oregon Right to Life recently reported that a "deformed" baby was being "starved to death." A state court judge ordered intravenous feeding; however, on the tenth day of life the infant died due to congenital brain damage which had caused cessation of breathing.² The New York "Baby Jane Doe" case³ was initiated by a right-to-life lawyer, Lawrence Washburn, a resident of Vermont. The United States Surgeon General, Dr. C. Everett Koop, has also criticized "infanticide" of handicapped newborns.⁴

Proposed legislation would redefine child abuse to include the "denial of nutrition (including fluid maintenance), medically indicated treatment, general care, or appropriate social services to infants at risk with life-threatening congenital impairments."⁵ A Senate bill would require a Department of Health and Human Services (HHS) advisory committee to conduct a comprehensive study of decisionmaking procedures used in health care facilities in managing treatment of seriously ill newborns and to make recommendations regarding procedural mechanisms that should be followed by hospitals. After receiving the committee report, the Secretary of HHS would be required to publish proposed regulations, if deemed necessary, to establish decisionmaking procedures within each hospital. The penalty for failing to comply with such regulations would be the denial of federal financial assistance, including Medicare and Medicaid.

A comparable bill passed by the House further requires that: (1) state child protection agencies ensure that nutrition, medically indicated treatment, general care and social services be provided to imperiled infants; (2) a procedure be established by which "interested parties" can report known or suspected instances of the withholding of treatment (e.g., hotlines); and (3) state agencies investigate any reports of such "child abuse."

"Thou shalt not kill; but needs't not strive officiously to keep alive."

Despite the support in some quarters for involvement by governmental authorities in treatment decisions, a significant body of opinion recognizes the legitimacy of decisions by parents to refrain from ordering treatment which would not be in the infant's best interests. In its report, *Deciding to Forego Life-Sustaining Treatment*, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research ("President's Commission") recommended that parents, as surrogates for the seriously ill newborn, should be allowed discretion to determine, based upon "the best interests of the child," whether life-sustaining treatment should be foregone. The President's Commission recommended that the government encourage hospitals to improve their in-house supervision of such decisions and not become directly involved in treatment decisions.

Various medical societies, including the American Medical Association, the American Academy of Pediatrics and the American Society of Law and Medicine's Committee on the Legal and Ethical Aspects of Health Care for Children, also advance the position that withholding or removing life-sustaining means from imperiled infants is ethical where prolongation of life would

be inhumane and unconscionable.⁶ Similarly, the Vatican's 1980 *Declaration on Euthanasia* concludes that it is appropriate, when there is no hope of benefit to the patient, to withhold or withdraw treatment. This moral conclusion is not strikingly new. In the death scene at the conclusion of *King Lear*, Edgar wants to save Lear from the throes of an agonizing death born of grief at the death of Cordelia. The Earl of Kent seeks to dissuade Edgar: "O, let him pass! He hates him, that would upon the rack of this tough world stretch him out longer." Arthur Hugh Clough in his poem, *The Latest Decalogue*, expressed much the same sentiment: "Thou shalt not kill; but needs't not strive officiously to keep alive."

Beyond the question of whether it is ever proper not to treat an imperiled infant with all modern medicine has to offer lies the further delicate issue concerning criteria for deciding which infants should or should not receive care. How the question is posed will bear heavily on formulating a response.

The President's Commission concluded that a "best interests of the child" standard should govern treatment decisions and that the interests of parents, siblings and society should not count. Entirely excluding the potential psychic and financial harm to the family seems troubling because the best interests of the child are almost always inextricably tied to the interests of the family. Ignoring the economic costs of neonatal intensive care for imperiled infants is equally questionable. The President's Commission noted that the cost of high technology neonatal care approximates \$8,000 per patient, and that in 1978, \$1.5 billion was spent on neonatal intensive care. Added to this cost is the cost of special care, including perhaps lifelong institutionalized care. Economic realities for the family and society are not irrelevant, but their overt consideration raises fundamental symbolic concerns. Institutional mechanisms should be sought by which such explicit cost calculations can be avoided.

Perhaps the most difficult question in the debate over standards is whether the quality of an infant's life should be a permissible factor for consideration. If the child is not born "dying," to use Surgeon General Koop's taxonomy,⁷ and is not in pain, yet has no ability to think or communicate but simply lies in a crib blind, deaf and uncomprehending, can we honestly say that this child's quality of life is of no moral consequence? University of Texas law professor John Robertson has argued that even in such a "worst case"—that is, "the profoundly retarded, nonambulatory, blind, deaf infant who will spend his few years in the back ward cribs of a state institution"⁸—quality-of-life judgments should not prevent treatment.

By contrast, Richard A. McCormick, a distinguished Catholic moral theologian at the Kennedy Institute of Ethics, believes that quality-of-life considerations are legitimate. McCormick sees life as a value to be preserved only in so far as it contains some potentiality for human relationships (to think, to love and to communicate). When that potentiality would be totally subordinated to the mere effort of survival, then the withholding of treatment would be justified.⁹

McCormick is not alone in advocating taking into account the quality as well as the extent of the life to be sustained. In a recent California case involving the prosecution of two doctors for

discontinuing treatment of a comatose incompetent adult, the California Court of Appeals recognized the appropriateness of attention to quality-of-life considerations. In discussing the surrogate's decision to withhold treatment from a comatose adult patient the Court stated: "If it is not possible to ascertain the choice the patient would have made, the surrogate ought to be guided by the patient's best interests. Under this standard, such factors as the relief of suffering, the preservation or restoration of functioning and the quality as well as the extent of life may be considered."¹⁰

Given the wide array of well-considered moral stances concerning treatment decisions and criteria for selective treatment, we now face a public choice. Should society rush to reformulate law and social policies by enacting new child abuse laws, "Infant Doe" regulations, or new criminal codes; or is the best course to reserve judgment given the disparity of our heart-felt ethical views and allow a consensus to develop? In our view, wisdom counsels against regulating absolutism when reasonable minds have profoundly divergent views of questions relating to morals, life, and the family. We should not codify a particular moral or ethical belief which substantially intrudes on the autonomy of the family without a confident conviction that the chosen course is both popular and wise. The current public debate reflects little consensus and much introspection. As with so many decisions in life, perhaps it is best to wait and think it over a bit more before imposing a monolithic approach.

The case for reserving judgment on the question of what to do about treatment of imperiled infants may appear paradoxical in the face of existing criminal prohibitions against murder, manslaughter and child neglect. Robertson,¹¹ for example, has argued that withholding treatment from "defective newborns" violates numerous criminal laws including those for murder, involuntary manslaughter, conspiracy, child abuse and neglect. The perceived illegality is overstated, however. Selective treatment can co-exist with current criminal laws.

While criminal charges have occasionally been instituted against doctors or parents for withholding treatment, the results have been either acquittal or dismissal for lack of evidence. In Danville, Illinois, on June 11, 1981, the parents of Siamese twins and their physician were accused of attempted murder. The grand jury failed to indict. On October 13, 1981, Dr. Leonard Arthur, a pediatrician in Derby, England, was tried on murder charges (later reduced to manslaughter) for withholding food and treatment from an infant born with Down's syndrome. The jury acquitted Dr. Arthur after deliberating two hours.¹²

The results in these cases and the paucity of criminal charges in this area stem from a reluctance on the part of prosecuting authorities and juries to impose criminal sanctions when physicians and parents act in good faith and exercise reasonable judgment. As the Massachusetts Supreme Judicial Court noted in 1980 in *In the Matter of Spring*:

Little need be said about criminal liability; there is precious little precedent, and what there is suggests that the doctor will be protected if he acts on a good faith judgment that is not grievously unreasonable by medical standards.¹³

The *de facto* decriminalization of good faith and reasonable decisions to withhold treatment received recent approval in *Barber v. Superior Court*.¹⁴ In issuing a writ of prohibition to bar the prosecution of two physicians on murder charges for discontinuing life support equipment and intravenous feeding of a comatose adult patient, a California Appeals court reasoned:

Murder is the *unlawful* killing of a human being, with malice aforethought A physician has no duty to continue treatment, once it has proved to be ineffective [To determine whether treatment will be effective a] . . . rational approach involves the determination of whether the proposed treatment is proportionate or disproportionate in terms of the benefits gained In summary we conclude that the petitioners' omission to continue treatment under the circumstances [at the written request of the patient's wife], though intentional and with the knowledge that the patient would die, was not an unlawful failure to perform a legal duty.

Given the rarity of prosecutions and the recent judicial trend toward acceptance of private decisions to forego treatment in cases involving incompetent comatose adults,¹⁵ there is scant justification for following suggestions to either enforce present criminal sanctions more fully or to enact legislation permitting non-treatment. Gearing up the machinery of criminal prosecutions is at odds with prevailing practice and moral attitudes: legislative validation of the "physician's death-dispensing role" carries unpleasant social costs.¹⁶ In addition, a dollop of uncertainty in this area serves as a constructive constraint on abusive practices. Here perhaps, the law, like Milton's common man, serves best "to only stand and wait."

How one poses a question helps to shape perceptions about an issue. For example, in the area of imperiled infants, the issue is often framed as follows: If selective treatment occurs, by whom and by what process should treatment decisions affecting imperiled infants be made? At first reading this question appears entirely reasonable. But the question is actually quite loaded. It assumes the propriety of deeming family decisions on treatment as matters of public policy. Implicitly, that formulation of the issue establishes the legitimacy of public review and publicly-mandated rules of decision on matters that, presumptively, should remain within the private realm of family pluralism and autonomy. By implication, posing the question in that way invites governmentalized, centralized procedures and sets of criteria, thereby wresting responsibility for children from parents and imposing no significant duty on government to justify the displacement of the traditional rule of parental autonomy. As the Supreme Court observed in *Santosky v. Kramer*,¹⁷ however, parents possess a "fundamental liberty interest . . . in the care, custody, and management of their child." Indeed, the United States Supreme Court many times has recognized the broad authority of parents to make decisions affecting the welfare of their children.

The failure to understand the presumption in favor of parental responsibility and choice is the true lesson of the New York "Baby Jane Doe" case. As the New York Court of Appeals wrote:

It would serve no useful purpose at this stage to recite the

unusual, and sometimes offensive, activities and proceedings of those who have sought at various stages, in the interests of Baby Jane Doe, to *displace parental responsibility for and management of her medical care* There was a failure in this instance to follow the statutory scheme contemplated by the Legislature for the protection of children [child neglect proceedings] (emphasis supplied).

Instead of posing the public policy question in terms of when to treat and when not to treat, perhaps a more helpful way in which to frame the inquiry is: Under what circumstances should the primary "jurisdiction" of parents to govern the treatment of their infant children be ousted? Additionally, the inquiry should assess whether the circumstances justifying ouster are established by clear and convincing evidence.

A jurisdictional approach to treatment decisions involving imperiled newborns comports with an emerging consensus favoring the presumption of private choice by parents and physicians as opposed to judgments by courts or legislative fiat. The President's Commission urged that decisions on treatment for seriously ill newborns be made by parents unless the parents are disqualified by decisionmaking incapacity, an unresolvable disagreement between them, or because their choice of a course of action is *clearly* against the infant's best interest. In short, only if the family cannot decide or if its decision does not reflect a legitimate selection among tragic alternatives should family decisionmaking autonomy be displaced by public intervention.

It is parents, not judges, who must live with the consequences of their decision.

A recent public opinion survey conducted by the American Hospital Association and released in March, 1983, indicates broad support for family autonomy in treatment decisions. Sixty-seven percent of those asked felt that the patient's family should decide whether terminally ill patients should be kept alive.¹⁸ The proponents of reserving authority for treatment decisions of imperiled infants to parents and physicians include: the Judicial Council of the American Medical Association;¹⁹ the American Academy of Pediatrics' Committee on Bioethics;²⁰ the Association of American Medical Colleges;²¹ the American Society of Law & Medicine's Committee on the Legal and Ethical Aspects of Health Care;²² the *New England Journal of Medicine*;²³ the *British Medical Journal*;²⁴ the *New York Times*;²⁵ the *Wall Street Journal*;²⁶ and numerous commentators.²⁷

To enhance the ability of parents to make infant treatment decisions in a careful and informed manner, many groups have suggested that parents and attending physicians consult with institutional ethics committees or that such committees conduct prospective or retrospective review of parental choices. As the President's Commission noted: "When the benefits of therapy are [unclear], an 'ethics committee' or similar body might be designated to review the decisionmaking process."²⁸

Such entities can provide a check on private decisions and yet preserve an important sphere of family autonomy, allowing

government to avoid direct involvement. As with many such innovative institutions, however, care must be taken to see that the role of these committees does not become overextended.

Like civil courts, hospital ethics committees that review parental treatment decisions should apply a jurisdictional approach. The primary jurisdiction of parents to manage the treatment of their children should not be ousted or supplanted by committee decision absent clear and convincing proof that (1) the parents are themselves incompetent; or (2) the parents are in unresolvable disagreement; or (3) the parent's choice is clearly against the infant's best interests (recognizing various burdens and values, including quality-of-life considerations).

Reducing the number of infant treatment cases which are brought to court and limiting the judicial inquiry to whether the record clearly justifies ousting parents as decisionmakers are desirable policy goals. Courts such as New Jersey's Supreme Court in the noted *Quinlan* case candidly acknowledge that they are ordinarily "inappropriate" for making actual decisions on treatment or non-treatment. Such matters are particularly ill-suited to resolution in individual adversarial proceedings. In addition, decisions by parents and physicians, unlike those announced by courts, do not create judicial precedents and do not carry an imprimatur of public policy, with all the attendant symbolism. Perhaps the most significant drawback to judicial resolution of infant treatment decisions is that it separates power from responsibility.

Routinely vesting courts with the power to impose mandatory treatment nullifies parental authority but does not alter the continuing responsibility of parents for long-term care and custody, at least in the absence of a clearly defined public duty to provide resources for judicially imposed treatment. Courts lack both an immediate and long-term stake in the individual case; parents and physicians, however, are closely involved in every nuance of the case from the moment of birth. In the final analysis it is parents, not judges, who must live with the consequences of their decision. And, in the absence of clear parental overreaching, parental autonomy should be respected. ☐

End Notes

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Continued from page 15

aid of leg braces. She will never, however, under any circumstances, be a whole and perfect specimen.

But if this failure to be perfect proved costly for Baby Jane—depriving her of the protection of her parents as well as of the courts—she still had one rather powerful ally.

The federal government intervened in the matter. The Reagan Administration, on the basis of a law prohibiting discrimination against the handicapped, sought access to Baby Jane's hospital records in order to determine whether the withholding of treatment was an act of such discrimination. The courts denied the government access to the records.

The government had also intervened, though after the fact, in the case of Baby Doe—who was allowed to die merely because he would have been retarded if he had lived. The discrimination there was so blatant that the administration simply notified hospitals that they stood to lose federal funding if they ever again denied treatment or nourishment to handicapped babies; the hospitals were also ordered to post signs warning that such denial was prohibited by federal law and providing a hotline number for those who wished to report violations of that law.

Federal intervention in both these cases was regarded, almost universally, as unwarranted, unnecessary and unhelpful intrusion into private matters.

The medical profession was up in arms at the notion of bureaucrats—unschooled, unskilled and unsterile—patrolling the halls of science. And the journalistic community was unable to countenance such bullying by the government.

"Baby Doe," creaked the *New York Times*, "needs no Big Brother." In *The Nation*, bioethicist Arthur Caplan revealed that the government's intercession in the Baby Jane Doe case was "not just another example of New Right yahooism. It has a direct bearing on important social issues: abortion, parental rights, family privacy, control over one's own body." Even the *Wall Street Journal*, in whose corner *The Nation* no doubt found itself uncomfortable to be, announced that "the fear that somewhere in this broad land someone may sometime make a mistake is not a reason to have platoons of bureaucrats and lawyers second-guessing some of the most sensitive and most private decisions imaginable."

Decisions about medical treatment for a child ought, indeed, to be sensitive and private. And the legal ramifications of allowing the government to participate in such decisions are indeed worrisome. One would not, to be sure, wish to endow the government with the privilege of arbitrary intervention in family matters. It is not at all clear, however, that the Reagan Adminis-

tration's involving itself in these cases on the basis of a federal statute already in existence constitutes a dangerous precedent.

One could doubtless, moreover, find legal experts who are ready and willing to muster the arguments on both sides of this issue—which will obviously continue to be a matter open to hot debate in judicial circles.

But in fact, the issue is not fundamentally a legal one at all. What these cases—and the scores of others like them across "this broad land"—boil down to is one stark question: do parents have the right to do away with a child merely because that child fails to live up to the parents' (or their doctors') standards—mental or physical or both?

That such a question should be discussed with aplomb by doctors and parents, lawmakers and philosophers bears testimony to the forlorn position of handicapped children.

Indeed, if Baby Jane Doe were a cheat, a thief, even a rapist or a murderer, the question would never arise—or if it did, the answer would be an unequivocal "no." Children born with physical or mental deficiencies, however, simply in their failure to be perfect, commit the one sin that is intolerable nowadays.

Do parents have the right to do away with a child merely because that child fails to live up to the parents' standards?

That Americans—who are healthier than ever before, whose life expectancy is greater than it has ever been—are obsessed by physical perfection is obvious from the merest acquaintance with newspaper bestseller lists and television newscasts. Books on getting and staying healthy abound—and seem to have more staying power than even the juiciest potboiler. The evening news would not be complete without a story on the dangers of this, that or the other food additive or industrial chemical.

The roots of this obsession with health are easily identifiable. Those who spend their time and money in the pursuit of "fitness" seek to cheat death. And since death's most powerful weapons—smallpox, polio, pneumonia and, even to some extent, cancer—have been eliminated or undermined, these people are left to do battle with fleas.

When it comes to the children, however, something more than mass hypochondria is at work. Because birth control has made it

possible to choose when, or if, to conceive children, it has also permitted the delusion that parents are wholly the masters of that conception; that they are, in fact, the creators of their children.

For the enlightened and forward looking, then, who seem, sadly, to set the moral tone for the rest of us, children are viewed, not as a blessing of God, or even as a simple fact of nature. They are just another thing that one makes, like a soufflé. If only, then, one uses the right recipe and doesn't shut the oven door too hard, they should turn out just right.

In its mildest form, and if all is well with the child, this view engenders only a rather ridiculous vigilance of attention. Every quiver of development, from what the mother ingests during pregnancy to what the baby plays with in his crib, is subject to close scrutiny and analysis. This attitude leads to disaster, however, if the baby has serious problems.

Birth control has permitted the delusion that parents are wholly the masters of their children's conception.

Paradoxically, the notion that babies are as clay in their parents' hands, to be molded mind, body and soul, which might seem the ultimate in parental devotion, is really an expression of contempt for the mysterious complexity of human life. It is evidence not of a desire for an expanded parental role, but of the wish to evade the proper anxieties and responsibilities of parenthood.

For if there is a blueprint, a plan to be followed, steps to be taken, parents need only concern themselves with the minor details: should it be this nursery or that daycare center; breast-feeding for six months or a year; art class or gymnastics?

If, on the other hand, a baby is actually a *person* however helpless or incomplete; if, moreover, his chief requirements are love, security and order; if, in short, a baby is someone most likely to flourish—whatever his condition—in the bosom of his family, with the ungrudging respect and attention of his mother and father, they might be forced to lift their eyes from the contemplation of their own selves for long enough to take a good look at their child.

For all their willingness to give up coffee and cigarettes, alcohol and aspirin and even, in some cases, financial ease, the new breed of parents, now in the process of producing a minor baby boom, refuse to relinquish the one addiction likely to do more harm to their children than all the caffeine in Colombia: self-involvement.

Troublesome children are about the last thing in the world these parents need. They have plenty of troubles of their own to worry about: their careers, for one thing, or their own health, or

their relationships with each other, not to mention the possibility of a nuclear holocaust. In the face of all this, they simply haven't the energy to deal with babies with stuffy noses and aching ears, babies who scream for attention, babies who throw sand in the other kids' faces and grab their toys. And if even the ordinary difficulties of child-rearing are an unwelcome burden, how much more distasteful must seem the extraordinary difficulties of raising a handicapped or retarded child.

Fortunately, most children are, as the saying goes, tough. People have survived a lot worse than this kind of spiritual abandonment, and they will no doubt survive this as well.

Children like Baby Jane Doe, however, will have no such luck. For them, this parental rejection spells doom. They will, to put it plainly and simply, die; they are dying now.

That parents should sacrifice their children on the altar of their own selfishness is appalling enough. That they should demand the acquiescence, even the congratulations, of the society at large in their contempt for and irresponsibility toward life is unthinkable. Yet they do precisely that, and certain segments of our society do surely acquiesce and congratulate.

It is, the parents insist, only out of love that they seek to kill their children—to spare them the suffering that retardation or paralysis is bound to entail. These parents are, concur the judges, acting within their rights and doing so responsibly, taking into account all the medical and moral considerations. They are, interject the editorialists, much to be pitied—not only for having borne deformities, but for having to bear as well the outrage of the moral neanderthals among us. These parents, applaud the doctors, have courageously admitted that a life spent in a wheelchair, in a sheltered workshop or even in bed is a life not worth living.

All the public and private agonizing about love and the quality of life, all the litigation, all the editorializing is in fact nothing more than a demand that children who cannot walk, talk or think as the rest of us do be declared officially nonpersons, with no legal or moral status in the world.

In actively resisting this demand, the Reagan Administration, far from overstepping its bounds and posing a danger to the Republic, has, on the contrary, fulfilled its mandate.

It has acted to save lives—we shall never know how successfully for we shall never know how many parents, doctors, and hospitals were dissuaded from killing handicapped babies by the prospect of federal intervention.

And more important, it has taken a moral stand against infanticide. This can only hearten the majority of Americans who, however intimidated they may be by the intellectual and moral trend-setters, still know that parental duty entails a lot more than protestations of love and who do not believe that life is cheap and that children are an expendable commodity. ♣

ties as upfront employees in clean, automated environments.

Today's fast food establishments and the large-scale integration of minorities within their ranks owe much to some canny decision-making in the 1940s by a certain New York City entrepreneur. This entrepreneur purchased a small nut-vending business—Chock Full O' Nuts—and transformed it into a fast food restaurant chain that sold excellent coffee, milkshakes, orange juice and a few tasty sandwiches and desserts. The restaurants were well appointed, fully automated and organized to provide quick service. It did have one problem, however, which threatened to retard its operations—the unavailability of labor. To solve its labor supply problem in a wartime setting when there was virtually no unemployment, Chock Full O' Nuts chose to rely on what was then the only untapped source of labor—black females. The jobs were largely dead end, but they provided those black women with a wage as well as the opportunity to learn the discipline of work and to thus become part of the system. We have no detailed study of what the women thought or how the jobs affected their lives. Yet it would be fatuous to believe that this experience was not a step upward for them that improved their lives and that of their children.

Since the Chock Full O' Nuts innovation, the fast food industry has developed rapidly and so too has a burgeoning industry of fast food job critics—academics and publicists who often present only the negative aspects of these jobs and whose perceptions and prejudices have been absorbed into the wider realm of public opinion. Now, fortunately, the National Institute for Work and Learning has published a study on fast food jobs based upon detailed, carefully constructed interviews with persons who hold or have held such jobs. In his excellent introduction to the study, former Secretary of Labor Willard Wirtz writes: "Drawing on a firm and rich data base, [the authors] illuminate with facts the area of previously vague, and [as] it turns out erroneous, conjecture about what 'fast food jobs' amount to."

The study sample consisted of 7,741 present and former workers on the May or June payrolls of 279 fast food restaurants, including Arby's, Del Taco, Kentucky Fried Chicken, McDonald's, Roy Rogers and White Castle. The restaurants in the sample were randomly selected and reflected the mix of

owned and franchised entities within a company. Sixty-six percent of the employees contacted responded to the survey—a high response resulting from two follow-up mailings and a \$5 fee for a completed questionnaire. Although several fast food companies, as well as foundations, made contributions to offset the study's cost, it was wholly under the National Institute's control and clearly conducted without any company interference.

Who are the fast food workers and what impact has the dead-end job had on their lives?

Fast food workers were found by the study to be predominantly female (66 percent), young (71 percent were 20 years of age or younger), and white (77 percent)—although still less likely to be white than the population as a whole. Blacks comprised 16 percent of the sample and Hispanics 5 percent. A larger proportion of black employees (41 percent) than white (28 percent) or Hispanic (26 percent) employees are 21 years old or older. (In cities with large black populations, the workforce is overwhelmingly black.) A majority of the study respondents were part-time employees and only 25 percent had been on the job for two years or more. Two-thirds had completed or almost completed high school and nearly that number indicated the desire to graduate from a four-year college.

The workers received an average hourly wage of \$3.69 (just 34 cents above the minimum wage) and some fringe benefits such as free meals and vacations. They also received other things for which it is more difficult to assign a precise dollars and cents value: job training and job satisfaction.

The employees interviewed obtained most of their training through experience on the job with assistance from supervisors and co-workers. Some formal training was also involved. More than four-fifths of the workers found their training to be helpful. (This may be closely related to the fact that two-thirds of the employees felt they were treated fairly and about 70 percent believed management handled people well.)

Employees were trained to perform such industry-specific tasks as operating machines or training newer workers. More important, however, were the business and human relations skills which they developed on the job. They learned to come to

work on time and to groom themselves properly; they learned to deal with customers, to take directions and to assume responsibility for their mistakes, while in their personal lives they learned to save money and avoid spending what they did not have. The *Fast Food Jobs* study found that 40 percent of the employees believed that their jobs aided them in understanding general business principles; 69 percent stated that they gained a greater awareness of how business operates; 90 percent felt the job improved their ability to deal with people; and a full 94 percent believed that the job improved their ability to work with others. The workers, in short, became more employable. Their jobs gave them the skills and discipline necessary to enter and advance within the system.

In this regard, it is interesting to note that while only 33 percent of those surveyed felt that they were adequately paid and a majority felt they did not have sufficient responsibility, the workers still displayed a high degree of job satisfaction. Over 60 percent stated that they were satisfied with their jobs and nearly three-quarters said that they enjoyed working in a fast food restaurant. (The interviews, in fact, revealed a strong work ethic among fast food employees. Two-thirds expected work to be a central part of their lives; 82 percent declared that they would want to work even if not compelled to do so; and 92 percent wanted to do their best on the job.)

For minorities, the employment experience offered more than an opportunity to earn some pocket change. A higher proportion of blacks and Hispanics worked in fast food restaurants to help support their families, to gain work experience and to learn skills enabling them to advance into positions of greater responsibility. Blacks and Hispanics were more likely to work longer hours (61 percent of all black employees and 55 percent of all Hispanics worked 31 hours or more, compared with 45 percent of all whites) and have a more positive attitude toward performing specific job tasks.

When asked whether or not their work experience improved their employability skills, blacks and Hispanics were more likely than whites to acknowledge the job's positive contribution. Thirty-nine percent of the surveyed black employees and 43 percent of Hispanic workers felt the job taught them to be punctual; only 29 percent of all whites felt the job had helped them in this respect. More blacks and Hispanics than whites felt the job taught them the value of proper grooming, dependability, accepting responsibility for finishing tasks and the importance of saving money. Blacks and Hispanics were more likely to see their job as a first step toward positions of greater responsibility. Over two-thirds of blacks and Hispanics indicated a desire for more responsibility as compared to whites (55 percent). Employees from those two minority groups expressed a stronger interest in moving into management positions and felt their

chances were good for such mobility. Forty-one percent of all black employees and 38 percent of all Hispanics were interested in becoming managers as opposed to only 29 percent of whites. In short, *Fast Food Jobs* concluded that the "experience is more helpful to black and Hispanic employees than to white employees" by increasing their employability and job opportunities within the organization employing them.

In analyzing the study's findings, it becomes quite clear that dead-end jobs in the fast food industry are "dead end" only if one looks at them in terms of the industry itself, since upward mobility occurs not primarily from within the restaurants but rather from the restaurants into the broader system. The jobs pay little, but they help people to learn how to be worth more by teaching them how to work. They teach about how business operates and about relationships with supervisors, co-workers and customers. They impart a host of other necessary skills, attitudes and behaviors which are transferable to many different work situations, and they encourage the pursuit of education in order to better realize the aspirations which working kindles. (The high percentage of fast food workers who would like to complete four years of college is a good indication of the extent to which the workers themselves perceive their jobs as stepping stones to more remunerative positions.)

Whereas the immigrant garment workers a half century ago were likely to perform the same jobs throughout their working years and to value their jobs primarily as a means of creating a better future for the successor generation, today's fast food workers can and do view their jobs as a transitory experience leading to a more interesting and financially rewarding future for themselves. Over 90 percent of the employees surveyed in the study quit their jobs. Of these, nearly half specified that they did so either to take a different (and presumably higher-paying) job or to return to school.

Fast food jobs are certainly far from perfect. Yet people who hold them are pleased to work; they value their jobs as an opportunity to learn and grow—a base from which to improve their socio-economic status in American society.

It is perhaps ironic that many of the most insistent advocates of job training programs in this country are the same academics, journalists and government administrators who condemn the fast food job as, at best, a meaningless dead end and thus fail to see that the object of their contempt has in effect become one of the most massive, cost-efficient and racially equitable job training programs in our nation's history. It is to be hoped that with the issue of the *Fast Food Jobs* study, we will now begin to move towards a more balanced public understanding of the nature of these "quintessential dead-end jobs" and of what they mean to the people who hold them. ♣

Books

The Challenge of Thomas Sowell

by David A. Schwarz

CIVIL RIGHTS: RHETORIC OR REALITY?

Thomas Sowell

New York: William Morrow and Co., 1984. 164 pp. \$11.95

1984 has been an important year for civil rights in America. The 30th anniversary of the *Brown* decision and the 20th anniversary of the 1964 Civil Rights Act were marked with celebration and testimony to their meaning and importance. As Thomas Sowell notes in the introduction to his latest book, *Civil Rights: Rhetoric or Reality?*, this year is also an appropriate time for "an open and frank reconsideration of what has been done, and what is being done, in the name of civil rights."

In the case of civil rights this sort of introspection is especially difficult. Few debates of public policy have been conducted on such an emotional and personal level. Sowell acknowledges the "embittered atmosphere" of the current civil rights debate and notes that this latest book was written not for "pleasure" but out of "a painful duty." Sowell believes, however, that something must be said about the redefinition of "civil rights" over the past three decades.

Civil rights, Sowell argues, was originally understood to mean the fair and impartial treatment of all individuals, regardless of their race, sex, religion or any other social categorization. Their primary concern was to give the individual freedom to pursue his interests, unencumbered by invidious social distinctions or

state-sponsored discrimination. The civil rights movement of the 1950s and the 1960s fulfilled the vision of equality and opportunity first articulated by the founding fathers—that all men are equal under the law, deserving of no special privileges or onerous burdens. Though long in coming, the movement realized the goal of color-blind social policy by removing standards of classification based on race. "Judge our children by any standard you see fit," said Thurgood Marshall when he argued on behalf of the plaintiffs in the landmark *Brown* case, "but do not classify them solely on the basis of race."

Both *Brown* and the Civil Rights Act of 1964 were tangible manifestations of those goals. In fact, their specific intent was to insure that all employment, housing and education decisions be made *without* regard to race. Senator Humphrey, as Sowell points out, emphasized this during the debate over the Civil Rights Act of 1964 when he assured his colleagues that it would "not require an employer to achieve any kind of racial balance in his work force by giving preferential treatment to any individual or group."

Color-blindness was, therefore, the means and the end. Removing qualifications based on race and making those distinctions illegal ultimately brought about achievement of the desired goal. Yet what began as a movement for a color-blind society has become a movement for the adoption of color-conscious methods to correct inequalities. What happened? And why?

Sowell argues that the shift in the movement's goals—from the protection of equal opportunity of individuals to the assurance of equal group results—was not, as many assumed, an unnatural evolution. It was, rather, the inevitable result of a determinist vision of the world, a vision that saw all inequalities as the product of forces outside our individual control. This cause-and-effect vision of the way "society" rules our destinies is the

basic presupposition of what Sowell calls the civil rights vision—"not only a moral vision of the way the world *should* be in the future, but also a cause-and-effect vision of the way the world *is* today."

Though not immediately apparent, this deterministic vision was implicitly accepted by many from the beginning of the civil rights movement. To baseless and racist allegations concerning the innate inferiority of blacks (e.g., pseudo-scientific testimony concerning brain sizes), NAACP lawyers responded that statistics on black crime, disease, out-of-wedlock births and academic failure were attributable to the oppression of blacks by white "society."

Color blindness was the means and the end.

Sowell argues that the Supreme Court accepted these assumptions in the landmark *Brown* decision when it cited "modern authority" (sociological evidence testifying to segregation's deleterious effects) to prove that "separate" was inherently "unequal" because it caused black children to feel inferior and that these feelings had a demonstrably negative impact on black academic achievement. The remedies that flowed from these conclusions led, according to Sowell, to a number of unanticipated consequences, including desegregation through busing. "If it was separation that made schools inferior, thereby violating the Fourteenth Amendment, then only 'integrated' schools could provide 'equality' in education," said Sowell.

Yet the logic of the *Brown* decision, whether recognized or not at the time, had implications more far-reaching than initially imagined. At first, statistics concerning black academic underachievement were seen as the product of an undeniable social fact—segregated

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schools. But by the mid-1960s, the persistence of statistical inequalities between blacks and whites, not just in education but in income and occupation, were interpreted as weighty presumptive evidence of the presence of discrimination. Eventually, inequalities, not only between blacks and whites, but between the sexes and different ethnic and racial groups, were perceived as the product of a similar form of discrimination.

According to the civil rights vision, statistical disparities—whether in income, occupation, test scores, education, housing, or any other index of social well-being—are measurements of moral inequalities caused by “society.” In other words, absent the influence of any act of discrimination (a culturally biased test, a racist or sexist hiring procedure, etc.), all racial, sexual and ethnic groups should eventually achieve a roughly equivalent distribution on statistical social measurements.

Because the civil rights vision dichotomizes the range of causal factors into heredity or environment, those who reject theories of biological determinism are ultimately led, as Sowell points out, to the Lockian notion that individuals enter the world as blank slates upon which society writes what it will.

“Given the civil rights premise that statistical disparities are moral inequalities caused by social institutions, with group characteristics being derivative from the surrounding society, it follows,” writes Sowell, “that the solutions are basically political—changing laws and public perceptions.” Thus, political activity, either through elected office, legislative action or through the courts and administrative agencies, is, according to the vision, indispensable not only to remove the obvious forms of discrimination, but to root out the more subtle, pervasive forms of “institutional” racism—ways of making neutral decisions that appear to perpetuate “past” inequities.

“Don’t blame the victim” is a “mindless cliché.”

The logic of the civil rights vision influenced a series of major Supreme Court decisions on education and employment discrimination, including the *Bakke* and *Weber* cases. Had it not been for prior discrimination, reasoned four justices in the *Bakke* case, Alan Bakke may not have been able to out-perform the minority candidates he scored above on pre-med tests. By a similar process of deduction, the Court concluded that Brian Weber, a white steelworker rejected from a job-training program because of his race, would not have been able to compete successfully with his black colleagues for the same training program, for “only lack of skill” or seniority of the minority steelworkers was the product of some “purposeful discrimination in the past.”

Essentially, Sowell argues, the vision rejects the idea of individual choice and moral freedom and sees “society” as the oppressor and the individual as the “victim.” “Don’t blame the victim” is, as Sowell points out, one of a number of “mindless clichés” essential to the civil rights vision—a notion that divests the individual of any responsibility for his success or failure.

Sowell rejects the simplistic formula of the civil rights vision and all of its conclusions about how society shapes individual choices and measurable performance. He contends that neither biological nor social determinism can adequately explain group differences. His point is that members of ethnic and racial groups make different choices based on both individual experience and cultural history. People, he argues, have more control over their destinies than the vision imagines. And no single factor, including discrimination, can adequately account for wide intergroup disparities in income, education or

occupation.

For Sowell, discrimination is one more concept that can be tested empirically. It takes its place as one of a number of factors—including age, geographical location, immigration patterns, family size and behavior patterns and education (both in terms of quantity and quality)—that may or may not contribute to group success or failure. One cannot conclude, he argues, that the presence of discrimination alone will necessarily result in group disparities. Nor can one assume the converse: that the persistence of group disparities signals the presence of discrimination. Though both corollaries are essential to the civil rights vision, neither holds up under close scrutiny.

Sowell has raised these issues in several of his earlier books—*Ethnic America*, *Markets and Minorities*, and *The Economics and Politics of Race*—to demonstrate the importance of cultural and historical influences on the distribution of wealth and education. People, he contends, simply do not shed centuries of culture when they immigrate. Nor can discrimination, he argues, even begin to account for group disparities in income and occupation. Despite the prevailing assumptions about the correlation between racial discrimination and inequality, black West Indians have done better than certain groups of whites in this country and generally earn significantly higher incomes than black Americans. While both Chinese and Jews have known intense discrimination both here and abroad, they have also been conspicuously successful. Though the Chinese minority in southeast Asia has been and continues to be the target of legalized discrimination (bans and restrictions on land ownership, residence and education are common in Malaysia, Indonesia, Thailand and the Philippines), they have managed to acquire a majority of the nation’s investments in key industries in those countries. In short, numerous examples contradict-

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ing the civil rights vision abound. Those that challenge the vision's axiomatic relationship between discrimination and socio-economic disadvantage are, as Sowell points out, virtually ignored.

Furthermore, Sowell writes, patterns of occupation and education among ethnic groups often repeat themselves in other countries. Chinese are not only disproportionately represented in engineering and scientific occupations in this country but internationally as well. The enormous differences in income between Jews and Hispanics (in the United States as well as in Hispanic countries where Jews earn more than non-Jews) and between Chinese persons and persons of Anglo-Saxon descent in the United States are two examples that may reveal more about the influence of education, family behavior patterns and work habits than about the power of discrimination.

The most dramatic testimony to the civil rights vision's failure is the inability of its proposed solutions to materially improve the economic status of lower class blacks.

Sowell has also demonstrated that conclusions drawn from gross statistical comparisons between white and black Americans are largely illusory. Black college-educated couples, for example, have family incomes identical to their white counterparts. Surprisingly, recent black college graduates actually command slightly *higher* salaries than their white peers. Sowell also points out that female black/white wages are roughly equivalent—a fact commonly ignored by civil rights activists decrying the pernicious ef-

fects of discrimination on income.

The vision, as Sowell argues, has not only failed to properly diagnose the causes of social and economic inequalities; the political solutions chosen to correct these perceived disparities have provided further evidence testifying to the failure of the vision. He notes that the economic rise of minorities *preceded* passage of the Civil Rights Act of 1964 and that upward trends were accelerated neither by quotas nor through legislative action. In fact, Sowell suggests that certain pre-1964 economic gains made by blacks were more dramatic than those following the passage of the major civil rights legislation of the 1960s.

Sowell contends that blacks have made significant progress in the past three decades largely without the help of government intervention. Why is it, Sowell asks, that a "discussion of positive achievements by blacks be a source of embarrassment, much less resentment, on the part of black leaders? Because many of these positive achievements occurred in ways that completely undermine the civil rights vision." The negative features of black life, he argues, are more suitable as political currency when bargaining for larger political demands.

Perhaps the most dramatic testimony to the vision's failure is the inability of its proposed solutions to materially improve the economic status of lower-class blacks. In fact, Sowell argues that affirmative action may actually have worsened the problems of minority employment. "What is truly surprising—and relatively ignored—is the economic impact of affirmative action on the disadvantaged, for whom it is most insistently invoked. The relative position of disadvantaged individuals within the groups signaled out for preferential treatment has generally *declined* under affirmative action." Sowell also points out that more government resources aimed at ending discrimination will not even begin to assuage the problems of this nation's

growing black underclass. The tragedy of affirmative action, he contends, goes beyond its failure to materially improve the state of black Americans. The era of preferential treatment has also been the era of increasing and permanent black youth unemployment, high school drop-out rates and teenage pregnancies.

While Sowell sees the perceived benefits of race-conscious employment policies as minimal at best, he says the actual dangers presented by volatile experiments in social engineering are potentially disastrous. Preferential treatment, Sowell argues, often diminishes the real successes of minorities by conveying the impression that members of protected classes "weren't good enough" to make it without help from the government. Furthermore, there is "still more reason to fear the long-term consequences of polarizing the nation. Resentments do not accumulate indefinitely without consequences." "Many racial policies," Sowell concludes ominously, "continually add to the pile of combustible material, which only needs the right political arsonist to set it off."

At the heart of his objection is the belief that laws passed to protect individuals from discrimination should not be used to make economic policy. "Civil rights are fundamental to a free society and to human dignity." They are "important in and of themselves, and not as a miracle ingredient from which to expect great economic or educational changes in accordance with particular social theories. Civil rights have not 'failed' or remained 'illusory' because the economic or social consequences predicted by those theories have not materialized. It is, after all, possible that those theories have failed."

The point which Sowell makes repeatedly throughout *Civil Rights* is that "the struggle for civil rights was fought and won—at great cost—two decades ago." Civil rights, he contends, must not be taken for granted nor abused. "But civil

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rights are not protected nor enhanced by the growing practice of calling every issue raised by 'spokesmen' for minority, female, elderly, or any other group a 'civil rights' issue. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right."

"Equal treatment does not mean equal results. Everything desirable is not a civil right."

As one would expect, Sowell has had more than his share of critics. As he notes in the epilogue of *Civil Rights*—entitled "The Degeneration of the Racial Controversy"—there has been a tendency among many civil rights activists to avoid the key issues by personally attacking Sowell or to make strawmen of his arguments. Evidence—once essential to the cause of civil rights—is increasingly ignored. "Whether it is low test scores or high crime rates, the first order of business is to dismiss the evidence and discredit those who bring it. Unvarnished facts are today more likely to arouse suspicion and hostility than any joyous anticipation of more ammunition for the good fight."

Attempts to discuss group characteristics not readily quantifiable but nonetheless critical are usually dismissed "as evidence only of the bias or bigotry of the observer." "Stereotypes," Sowell writes, "is the magic word that makes thinking about such things unnecessary." And yet these factors—work habits, discipline, reliability, sobriety, cleanliness and cooperative attitude—are indispensable indices that help calculate the success or failure of ethnic or racial groups.

Though sometimes harsh in his criticism, Sowell has forced civil rights advocates to take a hard look at what has, and

has not, been accomplished in the three decades since the struggle for racial equality began. In *Civil Rights: Rhetoric or Reality?* Sowell takes an important step toward redefining the terms of the civil rights debate. Perhaps this sort of introspection was inevitable, for as time and experience has shown, the vision has failed to promote social progress for those in most critical need of help. As Sowell points out in the conclusion of *Civil Rights*, no vision of the world can adequately explain all reality. Indeed, visions that claim such omniscience can often become ideological prisons, preventing rather than encouraging the pursuit of satisfactory solutions to urgent social problems. □

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Thinking Realistically about Integration

by Max Green

SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT

National Institute of Education, U.S. Department of Education, May 1984. 224 pp.

The National Institute of Education, the research arm of the Department of Education, recently published *School Desegregation and Black Achievement*, a collection of papers that addresses one of the great social science questions of our time: Does racial integration raise the achievement levels of black students?

Public interest in this question was first raised, of course, by the series of court cases that challenged the *Plessy v. Ferguson* doctrine of "separate but equal" as it was applied to public schools. As far back as the 1930s, the NAACP brought suits demanding equal input—equal expenditures, facilities, etc.—into black schools with the expectation that equalization would improve the performance of black students. That battle was won in the courts.

The NAACP then took its argument one step further and argued in *Brown v. Board of Education* that no matter what the input, segregated black schools were inherently unequal. The Supreme Court was unanimous in believing that segregated schools were unconstitutional. But they were faced with a choice of grounds upon which their ruling should rest. The Court ruled that assignment by race was

self-evidently unequal treatment and therefore in clear violation of the 14th Amendment. But it also relied, at least in part, on social science findings as to the effect of segregated schools on the "hearts and minds" of the black children. The Court referred to social science studies by psychologist Kenneth Clark and others which purported to show that black children who attended segregated schools had lower self-esteem than those who went to integrated schools. It was hypothesized that these feelings of inferiority lowered black students' aspirations and thereby, their academic achievement. The conclusion: separate but equal was a fiction.

Integration is not and never has been held to be a constitutional requirement when there has not been a finding of segregation.

As commentators at the time and since have noted, resting the decision about the meaning of Constitutional language on "modern authority" (Chief Justice Earl Warren's words) is risky business. Today's social science wisdom could turn out to be tomorrow's folly.

In this particular instance, there was cause from the outset to doubt the findings of the studies relied on by the Court. For example, Ernest Van Den Haag pointed out in court testimony in a subsequent case, using Professor Clark's own measure of self-esteem (e.g.—whether a child preferred a black or white doll), that research indicated that black students in integrated schools had a lower sense of self-worth than black students in segregated schools.

Whether integration has any effect—positive or negative—on black achieve-

ment is not an academic matter of concern only to legal scholars. Assuming, as the Court properly held in *Brown* that segregation is unconstitutional, the obvious remedy for a violation is a desegregation order prohibiting the assignment of students on the basis of race. As lawyers for the NAACP argued in *Brown*, what the Constitution required is the striking down of race as a basis of assignment: "do not assign [students]... on the basis of race.... If you have some other basis, ... any other basis, we have no objection. But just do not put in race or color as a factor."

Though often used interchangeably, "desegregation" and "integration" are not synonymous. Desegregation is the dismantling of an assignment system based on race, whereas integration requires a positive effort at racial balancing. While it may be within the equitable powers of the courts to order integration as a remedy upon a finding of illegal segregation, integration is not and never has been held to be a constitutional requirement when there has not been a finding of segregation. Therefore, it must be judged by different criteria than constitutionally-mandated desegregation. With respect to any integration order, we need to ask two separate and distinct questions. One, will it increase the number of whites and blacks that attend schools together? Two, will it benefit the black students whose constitutional rights have been violated? If not, it is an inappropriate remedy.

Since the time of *Brown*, the body of social science research on the latter question has swollen. But, the conclusions of the studies have varied enormously. It was for this reason that the NIE decided to convene a panel of social scientists to analyze past studies on this subject. The panel included two scholars (Robert Crain and Paul Wortman) who concluded from their own studies that integration had positive effects on black achievement; two (David Armor and Norman Miller) who

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found negative effects; and two (Herbert Walberg and Walter Stephan) who discovered no significant effects. The seventh panel member, Thomas Cook, served as a methodological policeman.

The panel as a body first weeded out methodologically weak studies. Among the 27 reasons for eliminating a study from further consideration were unknown sampling procedures, no control data and different kinds of pre- and post-tests. Out of the 157 studies that were initially reviewed, all but 19 failed to pass methodological muster, proof in and of itself of the perils of putting too much faith in the results of one, or even 100 research reports.

The 19 studies that survived the cut were individually analyzed and an analysis of these analyses was made by Cook. It was hoped that such an attempt at individual analysis within the discipline of the group—with its built-in requirement of discussion, proofs, criticism and rebuttal—would constitute a significant improvement over previous attempts to draw conclusions from the research literature. With everyone looking over each other's shoulders, each researcher would be as objective as possible, and reach only those conclusions that rigorous research required.

While the panel was not asked to address the question of self-esteem, two of the panelists—Miller and Stephan—discussed the issue in their papers and concluded that integrated schools have no positive effect on either self-concept or level of academic aspiration. Miller reported that recent research shows that “if school desegregation does affect the self-esteem of black children, its effects, at least initially, are more likely adverse than positive.” In so far as academic aspiration is concerned, he found that the research results were mixed. In any event, Miller noted that “researchers today would emphasize the impact of school outcomes (academic performance and achievement)

in forming personality or creating changes in it, rather than a causal pattern in which changes in personality cause subsequent shifts in performance.”

On the main question of educational achievement, the subject of the study, there was a variety of views:

Armor: “The conclusion is inescapable: the very best studies available demonstrate no significant and consistent effects of desegregation on black achievement.”

Walberg: “School desegregation does not appear promising in the size or consistency of its effect on learning of black students.”

Stephan: “These results appear to indicate that verbal achievement improves somewhat but math achievement shows little effect as a result of desegregation.”

Miller: “The desegregation studies that met the NIE minimal criteria show some moderate academic benefit to black children when they attend desegregated schools . . . the magnitude of these effects translates into the rather trivial increase of about twenty points on the typical SAT . . .”

Wortman: “The effect size found in both (math and reading) analyses . . . indicates about a two-month gain or benefit for desegregated students.”

Cook, the methodological watchdog: “desegregation—probably does not increase math achievement, . . . it probably raises reading scores between two and six weeks.”

Of the seven panelists, only Crain came to significantly different conclusions. And he was specifically criticized by four of his colleagues for using the data of studies that the others threw out for methodological deficiencies. Both Armor and Cook pointed out that if these weak studies were eliminated from Crain's analysis, his conclusions would have been roughly equivalent to those of other panel members.

Assuming the NIE study to be definitive, which it isn't, these conclusions would be discouraging to those who have

for over a quarter of a century touted integration as an effective tool for improving black academic achievement. It seems to do nothing to improve the mathematical skills of black students. And assuming that it does raise reading skills by two to six weeks, that will just begin to close the more than one year gap now separating white and black children.

In fact, even this minimal gain may be an illusion. Most studies that were reviewed showed no effects whatsoever. This may mean, as David Armor suggests, that the few studies that reported large effects were picking up the impact of special educational programs that were implemented simultaneously with integration plans.

Also, the most effective plans were voluntary. So, for all we know at the present time, court-mandated, involuntary integration plans have no positive effect on black students' performance.

As several of the panelists remarked, the NIE study is by no means definitive. In fact, Cook said he had little confidence that we know much about how desegregation affects reading and he rejects the assumption that the studies reflect actual populations. While the NIE study does not close the book on integration research, it certainly should give pause to courts which have demanded that school systems integrate on what may be an unsubstantiated assumption that integration will help black children learn. ☐

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;

Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin; and

Submit reports, findings, and recommendations to the President and Congress.

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