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CIVIL RIGHTS

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Q&A with M.A. D.B.E. Antonia Hernandez

U.S. COMMISSION ON CIVIL RIGHTS

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

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;

- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;

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

- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;

- Submit reports, findings, and recommendations to the President and Congress;

- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

In furtherance of its fact-finding duties, the Commission may hold hearings and issue subpoenas (within the State in which the hearing is being held and within a 100-mile radius of the site) for the production of documents and the attendance of witnesses.

The Commission consults with representatives of Federal, State, and local governments, and private organizations.

Since the Commission lacks enforcement powers that would enable it to apply specific remedies in individual cases, it refers the many complaints it receives to the appropriate Federal, State, or local government agency, or private organization for action.

The Commission is composed of eight Commissioners: four appointed by the President and four by Congress. Not more than four of the members can be of the same political party. From among the Commission's members, the President designates the Chairperson and Vice Chairperson with the concurrence of a majority of the members.

Commissioners serve staggered terms of six years. No Senate confirmation is required. The President may remove a Commissioner only for neglect of duty or malfeasance in office.

Except in August, the Commissioners hold monthly meetings and convene several other times a year to conduct hearings, conferences, consultations, and briefings.

The Commission has 51 Advisory Committees—one for each State and the District of Columbia. Each is composed of citizens familiar with local and State civil rights issues. The members serve without compensation and assist the Commission with its fact-finding, investigative, and information dissemination functions. Members are nominated by Commissioners or the regional director for the area and voted on at a regular meeting of the Commission. The term of office is two years.

A full-time Staff Director oversees the day-to-day activities of the Commission, headquartered in Washington, DC. The Staff Director is appointed by the President with the concurrence of a majority of the Commission's members, and serves at the pleasure of the President. All Commission personnel are employed under Federal civil service regulations and job classification standards.

Each of the Commission's six regional offices coordinates the Commission's operations in its region and assists the State Advisory Committees in their activities. Regional offices are in Washington, Atlanta, Chicago, Kansas City, Denver, and Los Angeles.

The Commission's Robert S. Rankin Civil Rights Memorial Library is situated in Commission headquarters, 624 Ninth St., N.W., Washington, DC 20425. (See page 68 for details on this clearinghouse of civil rights information.)

The Commission and its State Advisory Committees have produced hundreds of reports and studies on national, regional, and local civil rights matters. Copies of these publications are available free to the public, as is a "Catalog of Publications," by request to the Publication Office, U.S. Commission on Civil Rights, 624 Ninth St., N.W., Room 600, Washington, DC 20425.

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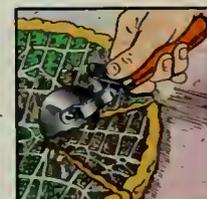
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The standard narrative of the modern civil rights movement, shorn of qualifiers and scholarly nuances, runs something like this. Beginning in the mid-1950s, African Americans and their supporters rose up in a heroic, often dangerous, but ultimately successful effort to end segregation and secure voting rights for all Americans. That movement, enshrined in our national consciousness and populated by a pantheon of heroes, villains, prophets, and martyrs, quickly became the lodestone for subsequent efforts to secure the rights and dignity of other disadvantaged Americans, including Indians, Latinos, Asian and Pacific Islanders, disabled persons, women, and the elderly.

But one by one, the great champions of that era died or were assassinated, and in the years since, the numinous moral clarity of their cause has dimmed. To its critics, the movement became an umbrella of entrenched interest groups united only in their insistence that they be accorded special treatment. Even to its proponents, the movement seemed perpetually on the defensive, sails luffing nostalgically in winds that had grown indifferent to the cause. Voting rights may have been secured, but the problems that remained, such as widespread economic and educational inequality, seemed intractable; the solutions that were proposed to remedy them, such as affirmative action and poverty relief, were controversial, problematic, or simply unpalatable. Today, few young people view civil rights struggles with the same ardor that their parents felt for the efforts of Dr. King and the Freedom Riders a generation ago. The movement, this narrative instructs us, brought this nation closer to living out its creed—but it is, as a movement, history.

Yet as the diversity of themes and groups profiled in this issue of the *Civil Rights Journal* testifies, the underlying principle of civil rights—the establishment of equal opportunity and equal protection under law—continues to be an abiding and central concern. Consider the topics addressed in this issue of the *Journal*:

- ◆ The cover article focuses on African American athletic achievement, and calls for a renewed institutional investment in black community and school sports programs. Harry Edwards, the author, has been one of the foremost critics of sports as a vehicle for black self-realiza-

tion and social-economic advancement. His change of approach reflects a growing sense of alarm about the future of African American youth.

- ◆ The proliferation of Indian casinos is the one new fact most Americans know about Native peoples; the response, notes Paul Alexander, can be misguided, prompting calls for political action that would violate Indian sovereignty rights established by treaty.

- ◆ Service redlining poses difficult questions balancing a company's right to protect its employees versus the public's right to eliminate segregation. When, if ever, is it justified, and who is qualified to make that decision? New York State Attorney Chevon Fuller investigates.

- ◆ Domestic violence continues to be a plague on the land, with over one million incidents of physical or sexual assault estimated to occur each year. Making domestic abuse a civil rights issue, argues Pamela Coukos, may be one way to help diminish it.

- ◆ The Viewpoints Department examines the question of religious expression in schools, and asks whether the Equal Access Act of 1994, which accorded religious clubs the same rights as other clubs in public schools, needs enhancement. Our interview in this issue is with the dynamic leader of the Mexican American Legal Defense and Educational Fund, Antonia Hernandez. Hernandez and her organization serve as a national watchdog, litigating and promoting the civil rights of the Latino community.

The issues raised in this *Journal* may no longer seem as black and white as earlier civil rights struggles were—either figuratively or literally. Today's, multiracial, multiethnic society has generated a multiplication of concerns. How the black and white paradigm of earlier eras fits into this more complex equation remains unresolved. Nor are the issues as clear in moral terms as they were during the days of Jim Crow. But as the essays in this issue of the *Journal* make clear, civil rights continues to be one of the ways that America defines itself, prompting discussion, debate, legislation, watchdog activity—and still more discussion. That diversity is a sign of the movement's health, not of its decline.

David Aronson
Managing Editor

Disability Rights in the USA and Abroad

By Robert L. Burgdorf, Jr. © 1998

In signing the Americans with Disabilities Act (ADA) into law in 1990, President Bush heralded the new Act as an "historic new civil rights Act ... the world's first comprehensive declaration of equality for people with disabilities." He added that other countries, including Sweden, Japan, the Soviet Union, and each of the twelve member nations of the European Economic Community, had announced their desire to enact similar legislation. The picture of the United States as the accepted leader in guaranteeing civil rights for people with disabilities, with other countries poised to follow the U.S. example, turned out to be only partially accurate. President Bush's rosy predictions have not fully come to pass, and the reality is somewhat more complex than his comments suggested. A variety of historical, sociological, political, and cultural factors unique to each country have resulted in widely differing approaches to disability discrimination.

To be sure, a number of countries have passed laws prohibiting discrimination on the basis of disability since 1990, and the model of the ADA cer-

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tainly influenced many of these laws. For example, Australia passed a Disability Discrimination Act in 1992, and Great Britain enacted its Disability Discrimination Act in 1995. Each of these laws was affected, to a greater or lesser extent, by the U.S. enactment of the ADA, and borrowed concepts and language from it. The British and Australian laws illustrate, however, that various nations have followed very different paths in

passing laws that can be loosely considered "ADA-like."

The Australian Disability Discrimination Act is extremely comprehensive, forceful, and specific. With some accuracy one can describe it as having out-ADAed the ADA. As one concrete example, while the Bush Administration insisted on inserting into the ADA language from the Civil Rights Act of 1964 exempting private clubs, the Australian statute has a specific section prohibiting clubs and associations from discriminating on the grounds of disability.

The British version of a Disability Discrimination Act, in contrast, is much less broad, specific, and substantial than the ADA. Critics have contended that the 1995 statute is too narrow in the range of activities it covers, too restrictive in the scope of persons afforded protection from discrimination, and too watered down in prohibiting acts of discrimination. A prominent civil liberties lawyer, Lord Lester, reportedly described the

British Act as “riddled with vague, slippery and elusive exceptions, making it so full of holes that it is more like a colander than a binding code.” Whether or not such attacks are fully justified, even a cursory reading of Great Britain’s law reveals that it is not nearly as extensive or definitive as its American counterpart.

A few countries had laws pro-

Canada is one of very few nations where nondiscrimination on the basis of dis- ability is a consti- tutional right.

hibiting discrimination on the basis of disability prior to the ADA. A 1982 amendment to the Canadian Charter of Rights and Freedoms made Canada one of the very few nations in which nondiscrimination on the basis of disability is a constitutional right. At the statutory level, the Canadian Human Rights Act has prohibited disability discrimination since 1985. The interpretation and implementation of the Canadian requirements was influenced to a limited degree by regulations and court decisions under a U.S. statute that

was a partial predecessor to the ADA — Section 504 of the Rehabilitation Act of 1973. The Canadian courts have proven to be very receptive to the spirit of disability nondiscrimination laws, in contrast to the sometimes technical and wary reactions of some American courts.

In July of 1990, just weeks before the ADA became law in the U.S., France enacted an unusual statute that makes discrimination by an employer against a worker or applicant based on disability or state of health a criminal offense punishable by imprisonment for up to a year and a fine of up to 20,000 Francs. Many other countries, however, have never passed laws prohibiting discrimination on the basis of disability. Of the three countries mentioned explicitly in President Bush’s address as having expressed a desire to enact ADA-like legislation — Sweden, Japan, and the Soviet Union — the first two have yet to act on this desire and the Soviet Union was dismantled without having done so.

The reasons for failing to adopt such legislation are many and often closely related to the structure, philosophy, and character of particular nations. Sweden, for example, does not have a law explicitly prohibiting discrimination on the basis of disability, although the government is presently considering and expected to propose a narrow measure that would prohibit some such discrimi-

nation in employment. As part of Sweden’s overall character as a welfare state, however, its laws guarantee all its citizens the right to work and prohibit employers from discharging workers or reducing their pay for any reason other than certain specified grounds — essentially only documented downsizing or serious work misconduct. Disability discrimina-

Japan relies mainly on encouraging rather than requiring nondiscrimination.

tion is, therefore, prohibited *sub silentio*. This welfare state rationale has limitations, however. Such generic guarantees do not protect workers with disabilities from discriminatory practices other than discharge or pay inequities, and do not require any type of workplace accommodation for employees with disabilities, nor do they apply to persons who are merely applicants for employment. Outside of employment, Swedish laws do not prohibit disability discrimination in other aspects of society, such as access to transportation or public accommodations.

Japan’s laws regarding people with

disabilities rely mainly on encouraging rather than requiring nondiscrimination. Illustrative is an article of the Disabled Person's Fundamental Law, as revised in 1993, that establishes "Responsibilities of the Nation" as follows: "The nation shall, on the basis of social solidarity, endeavor to cooperate in promoting the welfare of disabled persons." Likewise, a

vetoed earlier renditions of such legislation, but a compromise version was finally signed in December of 1995. Other countries that have enacted laws prohibiting discrimination on the basis of disability include New Zealand and Kuwait. South Africa included a prohibition against disability discrimination in its new constitution that took effect in 1996 and is considering legis-

Historically, the development of the ADA and similar laws rested upon the legacy of the earlier civil rights struggles and methodologies of African Americans, women, and other groups in achieving legal guarantees of equality under the law in the United States. In part, differences between U.S. laws and those of other countries can be explained by the fact that many of those countries have not had a similar civil rights tradition. The lack of a civil rights mentality among the public, politicians, and even the disability community itself makes the successful enactment of disability nondiscrimination laws quite an uphill battle in such countries.

The laws of many countries contain employment quota requirements—a feature not found in U.S. law.

1994 law popularly known as the Heartful Building Law promotes accessibility in buildings used by the public by declaring that owners of such buildings "are encouraged to modify designs" to incorporate accessibility. Local governments are authorized to give advice about accessibility, and may, if they wish, order modifications to construction plans. Such laws highlight the overriding importance of politeness and cooperation in Japanese society in contrast to the enforceable legal mandate approach prevalent in American legislation.

In the post-Soviet era, Russia has passed legislation that provides some protection against disability discrimination. President Boris Yeltsin twice

litation to implement it. Various other countries are continuing to consider such legislation.

The laws of Sweden, Japan, Russia, and many other countries, particularly including European countries, contain a major feature not found in U.S. law — employment quota requirements. Arguably, such systems invoke a "special protection" model at odds with the equality mandate upon which the ADA is based. Britain repealed its quota law when it passed its Disability Discrimination Act. The laws of some countries, however, include both quota requirements and antidiscrimination measures. A more complete discussion of quota systems is beyond the scope of this article.

Robert Burgdorf, Professor at the University of the District of Columbia School of Law, is a U.S. delegate to the Working Group on Persons with Disabilities in the Western Hemisphere for the Drafting of an Inter-American Convention for the Elimination of All Forms of Discrimination for Reasons of Disability. While working at the National Council on Disability, he wrote the original draft of the Americans with Disabilities Act that was introduced in Congress in 1988. Professor Burgdorf dedicates this article to Paul Hearn, President of the Dole Foundation, an old friend and long-time advocate for disability rights who passed away while the article was being prepared.

UNDERMINING INDIAN SOVEREIGNTY RIGHTS...AGAIN

By Paul Alexander

Complaints that Indians are violating the civil rights of non-Indians often overlook Indians' sovereignty rights; at worst, they may signal new efforts to violate U.S. treaty obligations.

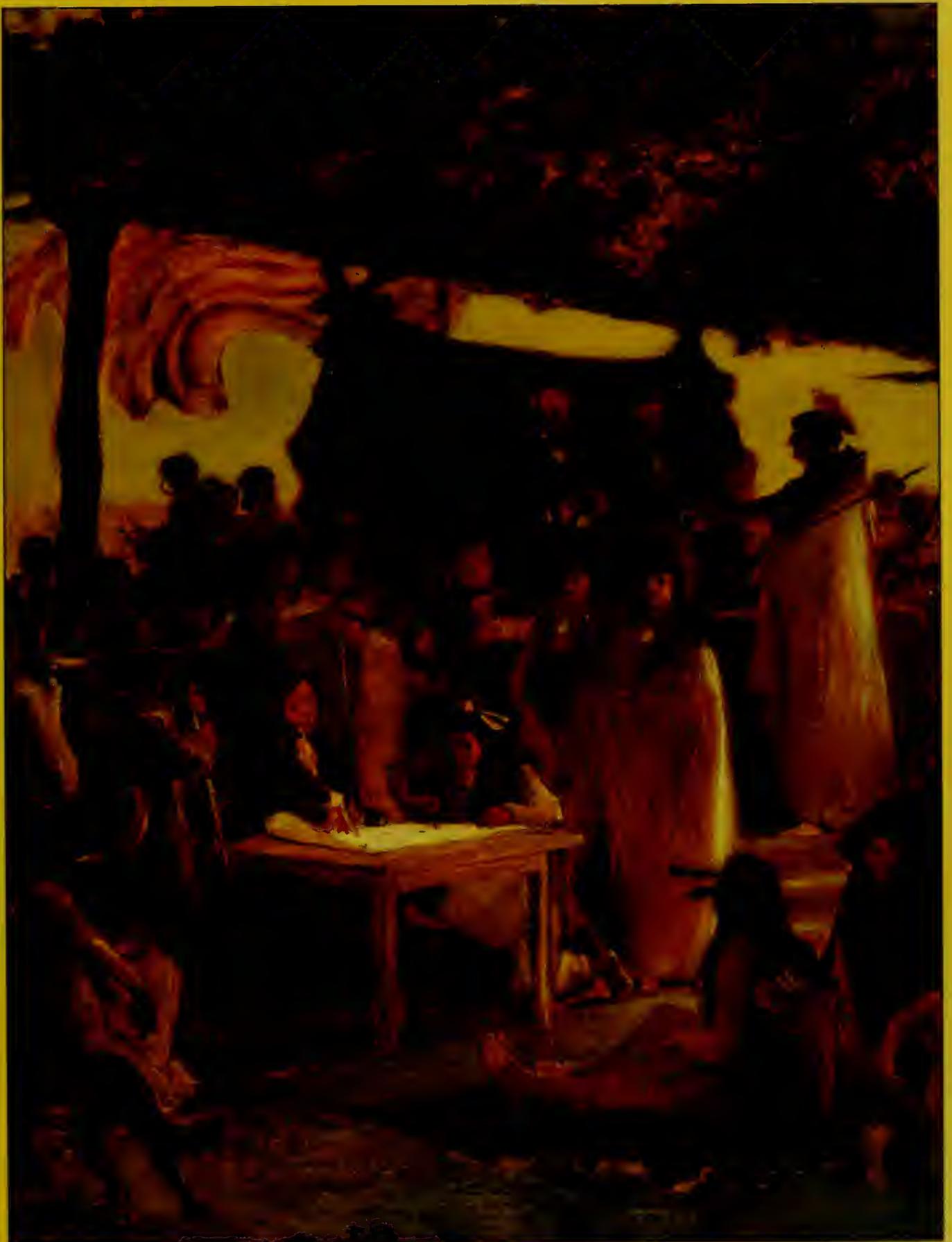
In June 1981, the U.S. Commission on Civil Rights issued a report: *Indian Tribes: A Continuing Quest for Survival*. In part, the report described the 1970s as a period when public attention was focused on the collision of Indian and non-Indian interests. The non-Indian protagonists and the popular media often characterized this conflict as a "civil rights crisis": Indian tribes were generally accused of violating the "rights" of non-Indians.

Usually the non-Indians who felt that their "rights" were being violated lived on or near Indian reservations, and they often asserted that Indian tribes should have neither governmental powers over non-Indians nor any "special rights" to water, fish, or other natural resources. Organizations such as "Montanans for Equal Rights" and "South Dakotans for Civil Liberties," founded on or near Indian reservations, asserted that they did not have much faith in the courts or the Federal Executive Branch, and instead focused on Congress as the means of obtaining redress for their issues. Various pieces of legislation were introduced to reduce or remove tribal fishing rights or the jurisdictional authority of Indian tribes over lands and people.

In response to these efforts, Indian tribes found that they had to step up the protection of their treaty rights and other sovereign rights against non-Indian people who seemed to covet tribal assets and who seemed determined to avoid tribal authority. Tribes had to explain their place in the American system of government and the origin of their rights, and they had to defend court decisions and other governmental decisions. Ironically, in doing so tribes were defending legal decisions that they often felt did not go far enough in protecting their sovereign rights.

This conflict or reaction to Indian sovereign rights and treaty rights, often presented as a civil rights dispute, was what the Commission termed "The Apparent Backlash."

The concepts of "rights" and "civil rights" in the Indian/non-Indian context has been the subject of much confusion. Indian tribes and their members have a special governmental status based on treaties and the United States Constitution. When the United States and Indian tribes are interacting in this government-to-government context, special treatment of Indians is not a violation of the Equal Protection Clause of the United States Constitution. In other words, where Federal-Indian treaties or Indian tribal sovereignty applies, special or different treatment of Indian tribes is not a civil rights violation. Although non-Indians may believe that their civil rights are being violated because Indians have special rights to water, fish, or gaming, those special rights of Indians are legal because they are established by treaties signed by the United States



Frank B. Mayer, "Treaty of Traverse des Sioux"

government with sovereign Indian tribes.

In mainstream American society, outside of this special government-to-government relationship between the United States and Indian tribes, Indian sovereignty and treaty rights do not apply, and civil rights laws and the Equal Protection Clause apply to the treatment of Indians in familiar ways. Thus, denials of voting rights or economic, educational, or housing opportunities are traditional civil rights violations and are within this jurisdiction of State and Federal courts.

Similarly, in tribal communities denial of due process to Indians or non-Indians before Indian governmental agencies violate the Indian Civil Rights Act of 1968, as well as most tribal constitutions, and are within the jurisdiction of tribal courts for remedy.

Because this special government-to-government relationship is easily confused with more familiar civil rights principles in mainstream society, it is always important to determine whether the label "civil rights" in the Indian context is actually being applied to legitimate civil rights issues or to attacks on Indian sovereign and treaty rights.

The history of the relationship between the United States and Indian tribes has numerous examples of attacks on Indian rights, land, and resources carried out under the banner of something else. In early times, the rationale was usually for the benefit of the Indians themselves; more recently "civil rights" arguments have been the rationale provided.

American history swings back and forth between pro-tribal eras and anti-tribal eras, between relatively positive periods, when tribal authority was respected and tribes controlled and utilized their resources for the benefit of their people; and relatively negative periods, when the official policy was to terminate tribal authority and remove tribal resources. Although this analysis simplifies the history of the United States and Indian tribes, it is accurate to state that those "backlash" periods are usually mischaracterized contemporaneously, at least by their proponents, as having a benign or even positive effect. It is with the hindsight of history that there is agreement that those episodes have produced havoc for Indians, their lands, and their rights. Although there are many examples of misguided or deliberate efforts to reduce Indian assets under the rubric of helping Indians and protecting their civil rights or their non-Indian neighbors' civil rights, a few historic examples are sufficient to make the point.

During the Revolutionary War, Indian tribes were

desired political and military allies of the United States. The United States Constitution recognized the primacy of the Federal relationship and responsibility to Indian tribes. This special relationship was reflected in early legislation; for example, the Trade and Non-Intercourse Act proclaimed the commitment of the United States to "act in the utmost good faith" in Indian affairs.

In the post-revolutionary era, however, the Southeastern tribes, whom Thomas Jefferson had characterized as peaceful and productive, and who had won several landmark United States Supreme Court decisions respecting their domestic sovereignty and jurisdiction, were removed for their own "protection" to the Oklahoma Territories. The weight of history has termed this removal "the Trail of Tears." Vast quantities of lands were lost by the tribes and then made available for non-Indian settlement.

Ironically, those removed tribes relocated to Oklahoma, re-established themselves as fully functioning communities with courts, schools, and industry, only to have their lands reduced and governments disenfranchised at the turn of the century during the "allotment period."

Again, under the guise of helping the Indian community, Federal legislation was enacted to replace communal land ownership with individual ownership; individual Indians were separated from tribal influences and induced to become similar to non-Indian farmers.

Allotment and reduction of tribalism were promoted for the benefit of Indians. Allotment, of course, was not limited to Oklahoma, but covered much of Indian country. By the time this experiment was over in the 1930s, Indians lost some 100 million acres of land, approximately two-thirds of their land base. Indian people endured immeasurable suffering: authorities suppressed their religions, and their children were often removed to boarding schools, where corporal punishment was the norm for speaking "Indian."

During the late 1970s the U.S. Supreme Court made a series of significant decisions recognizing tribal treaty fishing rights, tribal jurisdiction, taxing authority and other pro-tribal rights. President Nixon had denounced "termination" as Federal Indian policy, and endorsed Indian self-determination. Congress, by statute, instituted several programs that were designed to strengthen tribal government. As the Commission's report indicates, much of the backlash focused on tribal treaty fishing rights and tribal governmental jurisdiction. As noted, tribal opponents tried

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Indians' rights to water, fishing, or gaming are established by treaty.

DUE PROCESS IS A TWO-WAY STREET

By Lummi Nation Tribal Chief Henry Cagey



EDITOR'S NOTE: The following is an edited excerpt of the oral testimony of Henry Cagey, the four-term Chairman of the Lummi Indian Nation. The Lummi have been very assertive in protecting tribal rights. For example, the tribe taxed its own fishing members while leading the ultimately successful battle to assure that treaty based fishing income was not federally taxable. In its efforts to exercise what it perceives as necessary control over its water resources, conflict has occurred with some resident non-Indians. Chairman Cagey testified at one of the three 1997-1998 hearings that the Senate Indian Affairs Committee held on S. 1691, a bill that would remove the sovereign immunity of Indian tribes from suit by individuals and states. Although S. 1691 was scheduled for mark-up this Congress, it was withdrawn. It is anticipated that the issues S. 1691 address will continue to be in Congress for several more years.

My name is Henry Cagey, Chairman of the Lummi Nation, and also President of Affiliated Tribes of Northwest Indians. I am here to present the views of both on Senate Bill 1691. For the record, the Lummi Nation opposes this bill and feels that there are alternative solutions and remedies which this Committee should explore before further consideration of this legislation.

Let me begin by explaining to the Committee — that the Lummi Nation signed the Point Elliott Treaty in 1855 with the United States that promised protection of our homeland. However, by the early 1960s, over half of the reservation was lost to non-Indians. In the past few years, the tribe has been able to reacquire over 80 percent of the original lands which comprised the Lummi Reservation. Today, the residents are a mixture of non-Indians and tribal members. And, what we see Mt. Chairman, is that many of the non-Indians support what the tribal government is

doing on the reservation.

But, what we also see at Lummi is a small minority of non-Indian individuals wanting more and more of our land and more and more of our resources. For instance, we began to construct a water and sewer treatment plant for the reservation. This treatment plant was constructed by the tribe using Federal, State and tribal resources sixteen years ago. To ensure that sufficient water was available for existing tribal members and non-Indian homes on the reservation, the tribe had entered into water agreements.

During this sixteen year period, there has only been one appeal [complaint] concerning the fairness of the provision of the tribe's water to non-Indians. The complaint was made to the Water and Sewer Board [that manages the system and which consists of Indian and non-Indian members]. The complainant went through the Board's appeal system and through the tribal court and chose not to pursue the grievance any further. This was the choice and the right of this complainant to cease to proceed. This system was established to address disputes such as that which was filed by the complainant. On the whole, the residents of the reservation are satisfied with the treatment that they are getting from their system. However, this one complainant's views, which are the exception, are repeated over and over to the Committee to assert that the Lummi Nation's provision of due process is not adequate. This is simply not accurate. However, in an attempt to over-rectify existing dispute processes such as this, S. 1691 was introduced in the United States Senate.

And, if this Committee is going to look at due process and equal justice, then the non-Indians really need to take a serious look at honoring their own...integrity...their own treaties.

to cast their concerns as a “civil rights” crisis, focusing on the rights of individual Indians and non-Indians vis-a-vis tribal government.

Numerous commentators have indicated that the climate in which these conflicts occur is complicated by the continual absence of any level of understanding in the non-Indian community of Indian tribal status, rights, or history. Only because of this lack of understanding can these fights over resources and governmental authority be erroneously depicted as civil rights disputes. While as a generalization it is probably true that turning the spotlight on any government, including Indian governments, will identify some due process or civil rights issues, it is important to point out that the periodic reports of the Commission have never determined that a pattern or practice of civil rights abuses exist within tribal governments. Those problems that do exist with some tribal governments (e.g. training and record keeping) are problems that result due primarily to a systemic lack of funds, analogous to those existing in most rural governments. In fact, attaching the label of equal rights or civil rights to the periodic assaults against Indian lands, resources, or governmental authority should be a clear warning sign that Indian rights are being threatened.

The current era of Federal-Indian relations is very complex. The Federal courts no longer appear to side with Indians with any frequency. When the issue of tribal jurisdiction beyond clear-cut tribal issues and tribal lands arises in the courts, the results are unpredictable. Federal aid for Indian tribes has been stagnant in real dollar terms for most of the past several decades.

On the other hand, tribal governments have made tremendous strides in re-establishing themselves as the dominant governing force on reservations. Long neglected Eastern tribes have been re-recognized, while many formerly terminated tribes have been restored. Significant portions of Federal programs designed for Indians have been returned to Indian tribes for management and implementation through Indian self-determination contracts, self-governance compacts, and funding agreements. Indian tribes have focused attention on protecting and regulating their resources, with a particular emphasis on water rights.

One of the fundamental changes has been the ability of some tribes to conduct lucrative casino gaming on their lands. Successful Indian gaming has had numerous implications. While poverty and under-development remains the norm in Indian country, all Indian tribes are now perceived as rich. However, it is true that tribes that are very

successful economically have been able to transform their local landscape. They become major employers and economic forces in their communities and gain greater access to the political process. These tribes are able to re-purchase their lost territories and to better provide for the health, education, and welfare of their people. One very serious down-side, however, is that this prosperity triggers jealousy and resentment. Some communities are not comfortable with the once poor Indians having wealth and power. Degrading stereotypes appear and feed yet another anti-Indian backlash.

Although the existence of Indian gaming is probably the most universal “new fact” every American knows about Indians today, Indian gaming is not a panacea and is in reality a fragile industry under increasing pressure from States and the non-Indian gaming industry.

In 1986, the United States Supreme Court decided *Cabazon and Morongo Bands of Mission Indians v. Wilson*. This case determined that the State of California did not have jurisdiction to regulate card rooms and bingo con-

ducted by tribes on Indian reservations as a criminal or civil matter. This decision made clear that, except for States that absolutely prohibit all gaming, States had no jurisdiction over gaming on

reservations.

In the *Cabazon* decision, the Supreme Court urged Congress to regulate Indian gaming. After a fierce legislative battle between Indian tribes, States, and the non-Indian gaming industry, Congress did regulate Indian gaming. In the Indian Gaming Regulatory Act of 1988 (IGRA) Congress provided for a complex scheme for Indian gaming. IGRA requires tribes to develop regulatory systems as a pre-requisite for gaming. Different requirements are set for different categories of gaming. Class I gaming is defined as traditional Indian gaming and subject to the exclusive jurisdiction of the tribes. Class II gaming is defined as bingo, pull-tabs, and card games, and subject to tribal jurisdiction with oversight by a Federal National Indian Gaming Commission. Class III gaming is defined as all other types of gaming (all casino type gaming). In order to engage in Class III gaming, an Indian tribe has to enter into a tribal-state compact that defines the jurisdictional relationship between the tribe and the State and identify what gaming is permitted. States are obligated to negotiate in good faith, and tribes are permitted to sue States in Federal court for failure to negotiate in good faith. If a dispute continues to persist, however, the remedy would be mediation. If mediation did not lead to agreement, the Secretary of the Interior would then have the authority to

Indian gaming is a fragile industry under increasing pressure

impose a compact.

In the years following IGRA, some States and tribes were able to negotiate viable compacts. Where agreement was not reached, litigation was instituted and the first wave of court decisions interpreted IGRA in a pro-tribal manner. This resulted in additional compacts. In other States, in particular, Florida and California, negotiations were unsuccessful and litigation eventually reached the U.S. Supreme Court.

In 1996, the Supreme Court decided *Seminole Tribe v. Florida*, and struck down the portion of IGRA that allowed tribes to sue States. Efforts to amend IGRA by providing a remedy to tribes when a State either refuses to negotiate or will only negotiate on the most unfavorable terms have failed. Although there are 159 compacts covering 24 states and 148 tribes today, IGRA is now a statute without any means to enforce the rights to tribal gaming that it purports to recognize.

Tribes that do not have a compact in place have been forced to operate gaming without one. Those tribes have to face threatened or actual shut-downs from the United States Justice Department for “illegal games,” or have to cave into States on very unfavorable compact terms. Tribes with existing compacts that have renewal provisions (as opposed to permanent compacts) have been faced with significantly increased State demands (generally for revenue shares) in renewal negotiations.

In addition to the problems associated with compacts, tribes face other obstacles to successful gaming. Several States have increased state-licensed gaming that competes with tribal gaming. But perhaps the most significant problem for most tribes is that they are in very rural areas that do not have the populations to support lucrative gaming operations. For most tribes, gaming only provides a small source of additional governmental revenue.

The publicity about the relatively few tribes (perhaps twenty) that have casinos in viable market areas has been intense. Gaming revenues are used as rationales for questioning whether tribes should continue to receive Federal funds or maintain their tax status as governments. Questions are being raised as to whether tribes are guilty of civil rights violations against non-Indians and against individual tribal members.

For the past several years, tribes have spent a great deal of energy opposing anti-tribal legislative proposals. While not all the proposals are tied to gaming, the perception that tribes have become powerful and rich, and must be curtailed or limited, is implicit in most of the proposals.

There is an ongoing full-court press against tribal interests. Allegations of “civil rights” issues is used as a weapon against tribes, as demonstrated by a brief review of a few of the key legislative proposals in the current Congress.

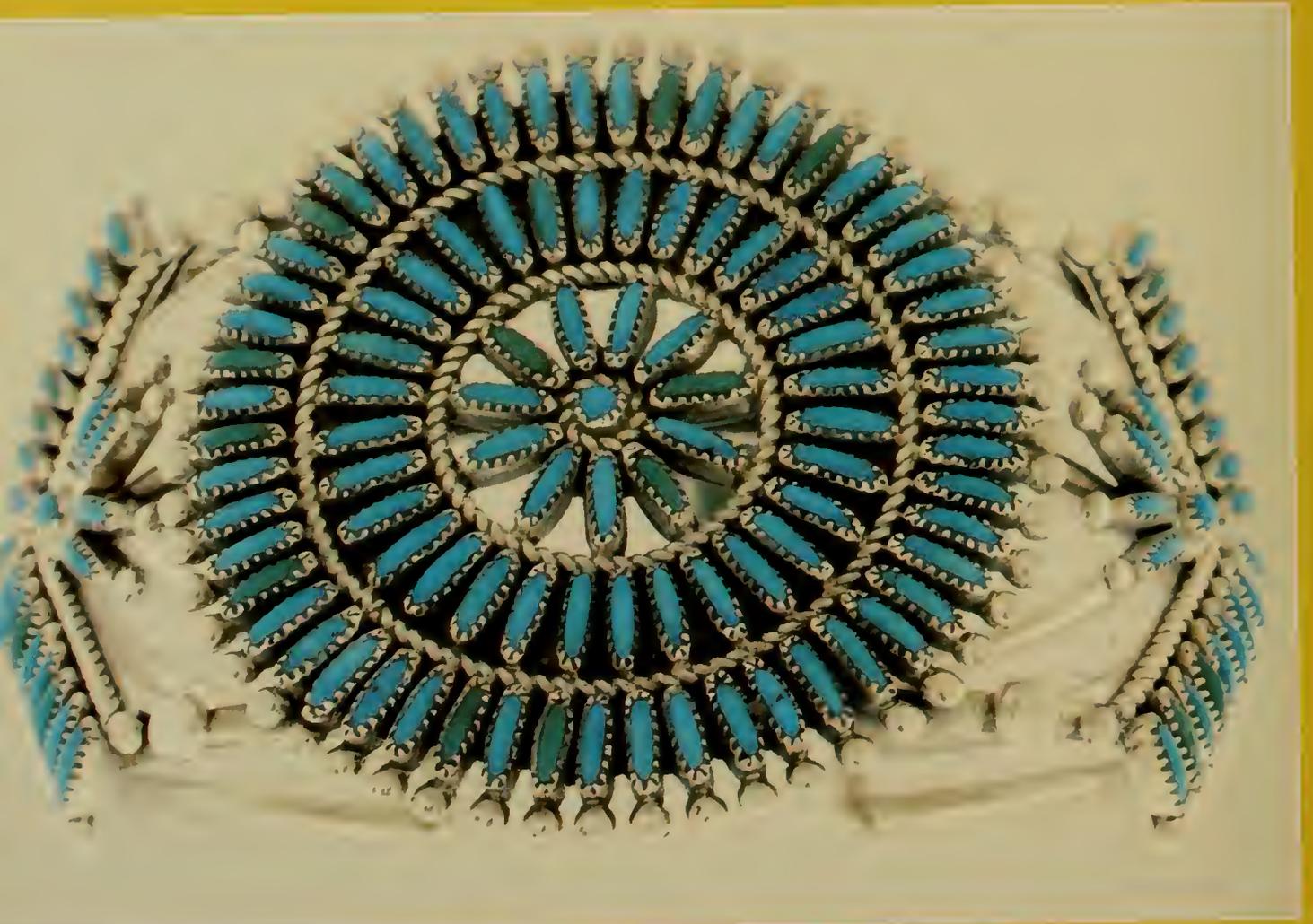
Serious legislative proposals have been put forth that would substantially undermine tribal rights and assets. One bill would grant State and Federal courts broad jurisdiction to hear claims against tribes and strip tribes of their sovereign immunity. For all practical purposes tribes would be treated as if they were commercial enterprises under this proposal. Various proposals would eliminate or reduce tribal gaming rights. One current proposal that has made it into appropriations law restricts the Secretary of the Interior from implementing administrative procedures to resolve disputes over tribal-State gaming compacts.

Although IGRA requires gaming revenues to be used for distinct governmental purposes and imposes Federal income taxes on income distributions to individual tribal members, there have been several proposals that nearly made it into law which would impose an Unrelated Business Tax (UBT) at a rate of 34% on tribal revenues from “commercial” activities. No similar proposal has been made relative to State revenues from lotteries or other gaming activities.

Another proposal would prevent the Secretary of the Interior from taking land into trust for tribes without agreements with local governments or at all, while a different proposed appropriation amendment would have “means tested” tribes to determine whether they could receive Federal funds. There is no means test proposed for rich states, some of which make income distributions to their citizens, relative to funds made available to States generally. It has taken enormous tribal efforts to defeat these bills, sometimes by a mere few votes. Not all of the bills have been defeated, and even those that have continue to re-appear.

This resurgence of “backlash” activity validates the perception of the Commission in 1981 — the publicity and attention that surrounded the backlash in the 1970’s would recede as other issues gained prominence, but the issues would not go away. Whenever the phrase “civil rights” is attached to Indian issues caution is required. It is important to understand that periodic conflicts over the economic, jurisdictional, or legal status of Indian tribes and special economic interests in the non-Indian community are not traditional civil rights issues. They may well be conflicts where Indian tribal rights are under attack — rights that are based on treaties, the Constitution of the United States, and the many other promises the United States made to tribes to preserve their right as governments to co-exist and to prosper.

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"Bracelet" by Edith Martza, Zuni Pueblo, 1965.

Photo courtesy of the U.S. Department of the Interior, Indian Arts and Crafts Board

WHEN IS IT AUTHENTIC INDIAN JEWELRY?

By Gail K. Sheffield

In passing the Indian Arts and Crafts Act of 1990 (Pub. L. 101-644, amending 25 U.S.C. sec. 305 and 18 U.S.C. secs. 1158 and 1159), Congress sought to counteract a substantial trade in counterfeit items, mostly from Asia, which are marketed in the United States as authentic Indian arts and crafts.

The Act appears to address this fraudulent activity forthrightly, and has been called a "truth-in-advertising" law. It imposes severe criminal and civil penalties on those who falsely imply that goods for sale are made by American Indians when they are not. To determine who is and who is not a "real" Indian, the statute and regulations define terms such as "Indian," and "Indian tribe."

Passage of the Act created instant controversy in the Indian arts and crafts industry, raising issues of sovereignty, Indian self-identification, authenticity of Indian art, suppression of free expression, and personal versus cultural rights. How is it that a full-blood, reservation-raised, native-language-speaking American Indian may not be a "legal" Indian, under terms of the Act, for purposes of producing arts and crafts for sale? How is it that one can buy craft items made by individuals who legally present themselves as Indian but who have little or no Indian ancestry or cultural attributes? What does this have to do with sovereignty anyway?

Sovereignty is a political status. The Indian Arts and Crafts Act defines Indians and tribes politically, that is, as members of Federally or State recognized tribes, or certified as artisans by either.

Indian identity, however, is not the same as a political status. There are individuals who are Indian by any objective standard who do not belong to, or may not be certified as artisans by one of the statutorily designated tribes. Those groups with only State recognition do not have sovereign status. Furthermore, those States which recognize "tribes" often do so without meaningful criteria, thus empowering people who may not have Indian ancestry or acculturation to engage in business as Indians. The Indian Arts and Crafts Act, along with other statutes directed to American Indians, has in common with sovereignty concerns the core questions: what is an Indian, and who is an Indian?

The continuation of tribal sovereignty appears to still be subject to the whim of Congress, despite historic treaty rights and arguments for constitutional protection of Native Americans. That is why legitimate tribes, through the individuals who comprise them, continue to do battle in the courts to protect their identity as Indian. Yet, fluid social boundaries in American society result in endless variations on ethnicity, biological ancestry, legal status, and identification by self and others. Sovereignty and Indian identity are inextricably intertwined.

In addition to sovereignty concerns, the statute prompts civil rights arguments concerning First Amendment problems of free expression and Fifth Amendment problems of equal protection. United States Senator Jeff Bingaman (D-NM) warned of "the odious spectacle of requiring American citizens to carry paperwork establishing their racial or ethnic purity before they can fully practice their chosen professions." Who should decide the identity and significance of being an Indian artist? The artist? The tribes? Congress? Each State government? The buyer?

Whatever the eventual fate of this statute, it certainly carries the message to scrutinize any Indian law for possible unintended consequences.

*Dr. Gail Sheffield, an attorney and cultural anthropologist, is the author of *The Arbitrary Indian: The Indian Arts and Crafts Act of 1990* (U. of Okla. Press, 1997).*

Antonia Hernandez: The Leading Latina Legal Eagle for Civil Rights

Back in 1956, as eight-year old Antonia Hernandez was preparing to move from Torreon, Mexico to Los Angeles, little did she realize that four decades later she would be leading one of the nation's preeminent civil rights organizations.

Since 1985, Antonia Hernandez has been in the vanguard, as President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF). As its CEO and chief lawyer, she leads MALDEF's efforts to protect the legal rights of the Nation's 29 million Latinos, the minority group that is expected to soon become the Nation's largest minority group. Working from her Los Angeles headquarters and five regional offices, with a budget of \$5 million dollars and a staff of 75, (including 22 lawyers), Hernandez and the members of her organization serve as a national watchdog, litigating and promoting the civil rights and other issues of special concern to the Latino community. Her organization works in close cooperation with other civil rights groups whenever their interests intersect, as well as with other organizations that work for the common good.

Hernandez's commitment to social justice comes from her parents, particularly her father who was one of many American-born Latinos corralled and arbitrarily deported to Mexico during a wave of anti-Mexican immigrant hysteria in the 1930s. Hernandez's awareness was further heightened when her family lived in an East Los Angeles public housing complex during her coming-of-age years, and while working as a summer migrant worker in 105 degree temperatures in the San Joaquin Valley. By the mid-1960s she was an integral part of the Chicano civil rights movement.

Ms. Hernandez received her B.A. from UCLA in 1970 and completed her law degree from UCLA School of Law in 1974. She worked for a number of non-profit organizations after graduation, including the Legal Aid Corporation, before being recruited in 1979 as a staff member for the US Senate Judiciary Committee.

She has been married for twenty years to Michael Stern, a civil rights attorney whom she met while they were both staffers with California Rural Legal Assistance, a group that worked closely with Cesar Chavez' UFW (United Farm Workers Union) in addressing the needs of migrant farm workers. They have three children and make Los Angeles their home.

CRJ: Tell us a little about what it was like when you were growing up in California?

The housing projects then were very different from the projects today. It was a working class, poor community with intact family units, but there were 'gang bangers' around. I liked books, so I was their little nerd and I was protected. I don't want to glamorize it, because I saw people getting killed in front of my eyes, for no reason whatsoever. Overall, though, we concentrated on family and church and school. We took care of each other.

CRJ: What was the experience of being the first Latina working on the US Senate Judiciary Committee?

I had to compete with the best and the brightest to get and keep that job. It was in the late 1970s, and it was a phenomenal, fascinating experience for a Latina to be able to go to Washington and actually be part of a historic Senate institution. I was in the belly of power and worked with a group of bright, dynamic people who are today at the center of influence, in and out of Washington.

CRJ: What are MALDEF's major priorities?

Actually we're up to our noses addressing a welter of familiar civil rights issues that won't go away anytime soon.

We've just finished working on issues of higher education, naturalization, affirmative action in the Federal government, the English-only initia-

tive, judicial nominations and appointments, minimum wage, and welfare reform. Whether it's at the State or Federal level, government has not been in a very positive, proac-

tive mode. But the pendulum is always swinging, and my staff is always on full alert, fighting the good fight day in and day out, anticipating the swings of the pendulum and tak-

ing full advantage when it swings back in our direction.

CRJ: Has MALDEF's focus changed since it was founded?

Unfortunately, the issues facing Latinos and our strategies to address them have remained essentially the same. What is changing is our emphasis, in large part because of the devolution that came about during the 1980s — the shifting of power from the Federal to the State and local levels. We have been pretty successful in staying ahead of that power shift and revising our strategies to make them relevant to the new realities. But make no mistake, MALDEF is still very much a presence in Washington because that is still where the major policy decisions first surface and get made.

CRJ: What is the most important civil rights issue facing Latinos?

There is no single issue that's most important — they're all interconnected. Latinos suffer more housing discrimination than any other group, for example, and there is no question that affordable housing in decent neighborhoods usually means better schools for our children, which is terribly important. Employment, language, immigration, police accountability, and health issues are all near the top of our list of concerns.

But if I were forced to choose only one it would be education. It doesn't take a rocket scientist to see why Latino kids are falling through the cracks in school. I challenge anybody to visit two Los Angeles schools, Beverly Hills High and South Central's Jefferson High — I could choose other pairs of schools in many other cities — and tell me whether they think that students attending those schools are getting the same quality education.



This Nation has to find a way to decrease our school dropout rates and increase the numbers of Latinos who pursue and complete post-secondary education. Right now, over 30 percent of Latinos do not graduate from high school, nationwide, and that figure is much higher in some places. It's a disaster in real time for the families involved, and a disaster in the making for the United States in terms of having an educated, competitive workforce. Without an educated Latino community, our dramatic increase as a percentage of the US population is not going to result in



policies that improve our lives as Americans. Wasn't it George Orwell who said "To be political, you first have to be well informed"? A solid education levels the playing field for everybody. It's the surest provider of equal opportunity.

CRJ: What is your organization's position on illegal immigration to the United States?

Every country should be able to control its own borders, but they can build the biggest wall along our southern border and it won't stop people from coming in illegally if the US economy demanded it. On top of that, growers will continue to demand to be allowed to bring temporary migrant workers in for the harvest, the majority of whom will be

ill-housed, underfed, and underpaid. Many will be continually exposed to toxic pesticides, and others, especially sugar cane workers, will suffer debilitating injuries. Finally, remember that over 50% of undocumented workers don't cross the southern border; they come in through ports of entries along our northern border and both coasts, entering on student and tourist visas and overstaying their visits.

MALDEF has always had a family reunification emphasis regarding US immigration policy, but we are now also emphasizing the need to attract more skilled workers from around the world. Why is it that when we are in a recession immigrants become the issue, the scapegoat, and when the economy is good you don't hear very much about immigrants who are here illegally and taking jobs away from Americans? Today's undocumented workers have virtually no rights or legal protection against abuses by employers, landlords, police and other forms of illegal discrimination. Several of your Commission's southwestern State Advisory Committees issued a scathing report last year documenting physical abuse of undocumented immigrants while in the custody of the US Border Patrol. The fear we (MALDEF) have is creating a permanent underclass of folks within our society, and that spells trouble for everybody. We must have a sound, generous policy that allows most people to enter the US legally so that they can have the full protection of our laws.

CRJ: How important is the "English-only" debate?

Language and religion are the bedrock of a culture. As someone who is bilingual and had to learn English, I can tell you I'm a much more valuable American by being bilingual. Latinos

have to learn English; it's the language of economic progress. However, that doesn't have to mean we have to forget Spanish and lose an asset that others don't have. We need to get beyond the American nativist [attitudes] of "English only" and deal with the reality of why Americans have the worst multiple language capabilities in the world.

CRJ: There are very few Latinos on the Federal Judiciary. What can MALDEF do about that?

MALDEF is spending some of its resources on that issue, because it is unlikely that Latinos will get our



array of law and justice related issues addressed "with all deliberate speed" if we don't have Latinos and people of color on the Federal Judiciary. We've been working closely with the White House, the Republican majority, and other Latino civil rights organizations on the issue. Minority judges and US attorneys have to endure triple the normal time in getting scrutinized and approved by the Senate. God forbid that these people expressed strong views favoring civil or human rights, because their confirmation will be further delayed, if not derailed, whereas a white person can usually go in and say the same thing and not cause a firestorm of controversy.

CRJ: MALDEF has been actively involved in key redistricting battles.

Will that involvement continue?

Since MALDEF came into being we've been involved in every important redistricting battle, and we intend to be very involved in the years 2000 and 2002 after the results of the next census count are in and are being implemented. It is fortuitous timing that the Latino population is growing rapidly in certain key electoral States.

MALDEF has been one of the organizations that has conducted a massive national educational outreach effort encouraging Latinos to cooperate with neighborhood census workers and be counted. We have hired a national director and seven regional coordinators to head up that effort.

CRJ: Is there increased competition and conflict among recent immigrants and other resident minority communities?

Although that may sometimes become an issue at certain times and places around the country, it's not anything unusual in US history. I don't see that as a significant issue right now. Besides, I keep hearing that competition is generally a good thing. One of MALDEF's core values is having a collaborative relationship with all minority groups. We've made significant progress in trying to understand and work with one another and not let divisive issues get in the way. That is not to say that we don't have issues, but rather than let them divide us what we're trying to do is find the issues we have in common.

CRJ: Are there any commonalities or differences among Latinos that you think are worth noting?

That's not an easy question to answer in a few words, because it invites stereotyping of one kind or another. But I think that there is wide agreement about some of the things that define us. Obviously, language and music and

other aspects of our culture bind most Latinos together, despite our different countries of origin.

We all share a sense that everyone, regardless of how high up the ladder of success he or she has climbed, deserves to be treated with dignity and respect. We recognize the sacredness and fragility of being human. It's not that our way is necessarily better, but we tend to confront the reality of death more openly than some others in this society do, and our religiosity and celebrations and art reflect this. And of course, we continue to be very strongly family-centered, some-



thing that we share in common with other groups.

However, there are real differences among us, too. Puerto Ricans are US citizens, so immigration is not as critical an issue for them as it is for many other Latinos. Yet, to some degree we are united by the types of discriminatory experiences that we all share because of our skin color, or accent, or names that often set us apart in other people's eyes. Immigration is an example of this. It impacts on Puerto Ricans directly because many people who discriminate against Latinos cannot tell one Latino from another, so many Puerto Ricans have to contend with bigotry and discrimination directed at immigrants, whether ille-

gal or legal. With Cuban Americans, immigration is indeed an issue, but one that Cuban Americans often approach very differently than do Mexican Americans and immigrants from other nations in Latin America and the Caribbean.

CRJ: Why did you become a lawyer?

There weren't that many Latina lawyers when I was growing up. My heroes and heroines were union organizers like Delores Huerta of the UFW. But at some point I came to realize that what sets this country apart from others is that it is governed according to laws and the moral codes behind them, and that our legal system plays a very big role in everyday life. For Latinos and other people of color, becoming lawyers, becoming part of the system, being able to use the tools of this profession to bring about needed change within the system — all of that is as American as it gets.

I'm a very practical person, but I am also deeply optimistic. I think that the future bodes well for Latinos as more and more of us become business and labor leaders and professionals. I have a great deal of faith in the role that my profession and legal organizations like MALDEF will play in helping to bring about positive change.

CRJ: How long can you keep this pace up?

I'm passionate about civil rights and 40 years from now I see myself still being passionate about civil rights. I spend a lot of sleepless nights wondering how I'm going to meet the payroll, but I've never spent a sleepless night wondering if I'm doing the right thing.



AN END OF THE GOLDEN AGE OF BLACK PARTICIPATION IN SPORT?

By Harry Edwards

For more than two decades I have been adamant in my contention that the dynamics of black sports involvement, and the blind faith of black youths and their families in sport as a prime vehicle of self-realization and social-economic advancement, have combined to generate a complex of critical problems for black society. At the root of these problems is the fact that black families have been inclined to push their children toward sports-career aspirations, often to the neglect and detriment of other critically important areas of personal and cultural development.

Those circumstances have developed largely because of: (1) a long-standing, widely held, racist, and ill-informed presumption of innate, race-linked black athletic superiority and intellectual deficiency; (2) media propaganda portraying sports as a broadly accessible route to black social and economic mobility; and (3) a lack of comparably visible, high-prestige black role models beyond the sports arena. The result is a single-minded pursuit of sports fame and fortune that has spawned an institutionalized triple tragedy in black society: the tragedy of thousands upon thousands of black youths in obsessive pursuit of sports goals that the overwhelming majority of them will never attain; the tragedy of the personal and cultural under-development that afflicts so many successful and unsuccessful black sports aspirants; and the tragedy of cultural and institutional underdevelopment throughout black society as a consequence of the drain in talent potential toward sports and away from other vital areas of occupational and career emphasis, such as medicine, law, economics, politics, education, and technical fields.

Today there has developed a serious decline not only in the fact, but in the perception and even the hope of mainstream life choices and life chances for an increasing number of black youths. One-way integration and the resulting exit of the black middle-class from the traditional black community has contributed to a spiraling deterioration in institutional viability in many black communities — a deterioration encompassing the functionality of the family, education, the economy, the political infrastructure, and even the black church. This unfortunate situation has combined with the ongoing legacies of anti-black racism and discrimination in America, the erosion or elimination of civil rights gains such as affir-

mative action, and structural economic shifts in the broader society to generate the epidemics of crime, drugs, violence, gangs and gang warfare, and a pervasive despair, malaise, and hopelessness that now afflict broad sectors of black society.

In that environment, literally thousands of young black people have institutionally, culturally, and interpersonally disconnected: they attend school only infrequently, if at all; they have given up any hope of ever holding a legitimate job or of being otherwise productively involved in the mainstream economy; they respect only their closest peers and seek only their peers' respect; and, in many instances, they see no future for themselves or their generation and have little expectation of living beyond their teens or twenties. Some go so far as to pick out the coffins and the clothes in which they expect to be buried.

Predictably, sports participation opportunities for those youths have also deteriorated. Playgrounds, sandlots, parks, and even backyard recreational sites in many instances have been taken over by drug dealers, or they have become battlegrounds in gang disputes, or they have simply become too dangerously exposed to eruptions of violence to be safely used. Cutbacks in educational budgets and shifts in funds from school athletic, physical education, and recreation programs to concerns deemed more vital in these fiscally strapped, troubled communities (including campus and classroom security) have further narrowed sports participation opportunities. Even where interscholastic sports participation opportunities have survived, security problems and fears of violence and other disruptions in an increasing number of cases have restricted both the scheduling of events and spectator attendance.

In the face of such discouraging circumstances, many black youths have opted to go with the flow, exchanging team colors for gang colors or simply dropping out of everything and chillin'. They move utterly beyond the reach and scope of established institutional involvements and contacts — save the criminal justice system, hospital emergency services, and the mortuary services industry.

The social circumstances facing young black males are particularly germane here. Nationally at least a quarter of

all black males aged 16 to 29 are under the control of the courts; in some States (such as California) this figure is approaching one-third of the black males in this age range. One-third of all the deaths in this group nationally are homicides (usually perpetrated by other black males), and suicide ranks only behind homicides and accidents as a cause of death. Moreover, since the age range 16 to 29 represents the prime years of self-development and career establishment, it should be no surprise that black males are declining as a proportion of the population in virtually every institutional setting (e.g. higher education, the work force, the church) save the prison system.

Predictably, black sports involvement is threatened as well. As alluded to earlier, developments at the intersection of race, sports, and education have over the years generat-

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themselves or their generation.**

ed a situation wherein increasing numbers of black youths have focused their efforts on athletic achievement only to find themselves underdeveloped academically and unable to compete in the classroom.

Nonetheless, their talents were so critical to the success of revenue producing sports programs — most notably basketball and football — at major colleges and universities competing at the Division I level those athletes were typically recruited out of high school or junior college notwithstanding their educational deficiencies, with the predictable result of widespread black athlete academic underachievement and outright failure. It was this tragedy and the attention it generated from sports activists and the media from the late 1960's into the 1980's that ultimately prompted the most far-reaching reform efforts in modern collegiate sports history.

But because black athletes' academic problems are in large part rooted in and intertwined with black youths' societal circumstances more generally, there can be no effective resolution of the educational circumstances of black athletes at any academic level except in coordination with commensurate efforts in society. In fact, to the extent that remedial efforts neglect such a coordinated dual approach, they are virtually guaranteed to exacerbate rather than better the situation of the black athletes that they impact.

Indeed, that has been the impact of much recent activity aimed at academic reform in athletics. At the high school level, the institution of more demanding academic requirements for athletic participation prompted many black athletes who subsequently have been declared academically ineligible to drop out of high school altogether.

At the collegiate level the establishment of Proposition 48, officially National Collegiate Athletic Association (N.C.A.A.) Bylaw 14.3, has had even more negative consequences. Proposition 48 requires that before he can participate in Division I college varsity sports, a student must have a minimum grade point average (GPA) of 2.0 in at least 11 courses in core subjects in high school and a minimum SAT score of 700 (ACT score of 17). The rule was instituted to counteract academically lenient recruitment practices, and though the specific requirements mandated under the regulation have been adjusted to accommodate various sliding scales of eligibility over the last decade, the essential thrust and intent of the regulation remains the same today — as does its disparate impact on black athletes.

In the first two years of Proposition 48 enforcement (1984-1986), 92 percent of all academically ineligible basketball players and 84 percent of academically ineligible football players were black athletes. As late as 1996, the overwhelming majority of Proposition 48 casualties were still black student-athlete prospects. Despite attempts to the contrary, such horribly disproportionate numbers cannot be justified on grounds that ineligible athletes would not have graduated anyway. Richard Lapchick, director of the Center for the Study of Sports in Society, reports that if Proposition 48 had been in use in 1981, 69 percent of black male scholarship athletes would have been ineligible to participate in sports as freshmen, but 54 percent of those athletes eventually graduated.

Complicating the effects of Proposition 48 is Proposition 42, which was passed by the N.C.A.A. in 1989 and was designed to strengthen Proposition 48 by denying athletes who failed to meet Proposition 48 eligibility requirements all financial aid during the freshman year. Proposition 42 effectively prevented prospective scholar-

ship athletes who did not qualify under Proposition 48 and who could not pay their own college expenses from attending college at all. Of course, this regulation disproportionately affected black athletes, since they numbered disproportionately among Proposition 48 casualties.

In 1990, following widespread objections to the draconian nature of Proposition 42 (most notably the protest efforts of Georgetown basketball coach John Thompson), Proposition 42 was modified to allow student-athletes who were "partially qualified" (i.e., who met either minimum grade point average or test score requirements) to receive non-athletic, need-based financial aid during the freshman year. Those who did not qualify under either test score or grade point average requirements still could not receive any type of financial aid. Still, black athlete prospects, always among the poorest and neediest of athlete recruits, continued to bear the brunt of the measure's negative impact.

It is now clear that the greatest consequence of Proposition 48,

Proposition 42, and similar regulations has been to limit the opportunities — both educational and athletic — that would otherwise be available to black youths. Those measures were neither conceived nor instituted with due consideration of black youths' circumstances beyond the academy and the sports arena. In consequence, while there has been some minor improvement in such concerns as black athlete college graduation rates (an increase estimated to be about 8 percent and possibly due as much to improved academic support services for black student-athletes after they arrive on college campuses as to any pre-recruitment screening function of Propositions 48 or 42), those results must be weighed against the profoundly negative cost of lost opportunities and more subtle consequences such as the stigmatizing of black youths as Proposition 48 cases or casualties.

The diminution of opportunities for black youths to succeed at the high school and collegiate levels must inevitably register and be manifest in all sports and at all levels traditionally accessible to black athletes in numbers. Already many high schools are unable to field teams or schedule dependable competition. Beyond the high school

The diminution of opportunities for black youths to succeed is manifest at all levels

ranks, in recent years there has been disturbing evidence of a downward trend in the statistics accounting virtually every skill category in Division I collegiate basketball: team and individual points per game averages; individual and team field goals percentages; individual and team free throw percentages; and assists.

Both college coaches and officials, and the media, tend to assume that such declining performance figures are due mostly to early entry into the professional ranks by star collegiate players. Many star players leave college after only one or two years of collegiate competition, and, in some instances, talented high school players skip college altogether and go directly into the National Basketball Association (N.B.A.). But the N.B.A. itself appears to be slumping statistically, and, in any event, the league shows no evidence of having benefited from any would-be talent windfall. In 1997, the average N.B.A. team scored only 96.7 points, the lowest regular season league average since the 24 second shot clock was instituted. Moreover, in the 1996-1997 season the average age of players in the N.B.A. was the highest in league history — older players are apparently able to hold on to their jobs and stay around longer because younger players are not able to displace them. Thus, regardless of how many collegiate basketball players are leaving or skipping college for the professional ranks, they are having no discernible impact as basketball talents at the pro level.

Other trends that individually would seem of little significance appear more troubling when considered within the context of emerging trends in black sports involvement. For example, black attendance at sporting events other than basketball and football games is virtually non-existent. As ticket prices continue to increase and more leagues and teams choose “pay per view” and cable television broadcast options, ever fewer numbers of blacks will be watching even basketball and football either in person or on television. Those trends are likely to affect most severely people abiding in the lower and working-class strata of black society that have traditionally produced the greater proportion of black athlete talent. With school and community sports and recreation programs and opportunities on the decline, declining personal access and expo-

sure to elite athletic performances virtually guarantees that both the interest and the involvement of that population in sport are likely to wane.

In this regard, the character of black involvement in baseball may be a harbinger of the future of black involvement in sports overall. Though major league baseball teams claim not to keep track of the race of their players and other personnel, it is estimated that approximately 18 percent of major league players are black. (In 1996, in a team by team count, I arrived at figures of 14 to 17 percent, depending on how some players of Caribbean or black Latino heritage counted themselves.) Eighteen percent is approximately the same black player representation in the major leagues as ten years ago.

Relatively speaking, this stagnation in the proportion of

black players in the major leagues may be the good news. It has been fairly well established that, for the most part, in urban areas (where over 80 percent of the black population lives) black adoles-

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than basketball or football
is virtually non-existent.**

cents and teenagers no longer either follow baseball or play it. Few black adults take their children to baseball games; in fact only about one percent of all major league baseball tickets sold are bought by blacks. Indeed, on opening day of the 1997 baseball season — a day which marked the fiftieth anniversary of Jackie Robinson breaking the color barrier against black participation in the major leagues — Jackie Robinson’s former team had the same number of black players on its roster as it did the day that he first stepped on the field in a Dodger uniform — ONE!

All considered, unless steps are taken to reverse present trends in both sport and society, we could be witnessing the end of what in retrospect might well come to be regarded as the golden age of black sports participation. We are, quite simply, disqualifying, jailing, and burying an increasing number of our potential black football players, basketball players, baseball players, and other prospective athletes — right along with our potential black lawyers, doctors, and teachers.

In the past I have resoundingly rejected the priority of playbooks over textbooks because of the triple tragedy scenario outlined above. So long as the traditional black community and the larger society — particularly in the wake of



hard-won civil rights advances and opportunities — effectively created and sustained some realistic broad spectrum access to legitimate means of personal and career development for the black youths in question (that is, access beyond the dream of sports stardom), criticisms and admonitions warning of a black overemphasis on sports participation and achievement not only were justified but necessary and even obligatory correctives to misguided attitudes and dispositions toward sports in black society. But today there is no option but to recognize that for increasing legions of black youths, the issue is neither textbooks nor playbooks — the issue is survival, finding a source of hope, encouragement, and support in developing lives and building legitimate careers and futures.

Without question, the ultimate resolution to this situation must be the overall institutional development of black communities and the creation of greater opportunity for black youths in the broader society. In the meantime, however, if community and school sports programs can provide a means of reconnecting with at least some of those black youths who we have already lost, strengthening our ties with those who, by whatever miracle of faith and tenacity, have managed to hold on to hope and to stay the course, then those programs and the youths involved deserve our strongest support and endorsement.

Therefore, I now say that we must reconstitute and broaden access to school sports programs. We must create secure and supervised playgrounds, park recreation areas, and community sports facilities; open school sports facilities for supervised weekend community use and mid-night basketball, volleyball, tennis, bowling, badminton, swimming, and other sports opportunities; recruit counselors, teachers, people trained in the trades, health care professionals, and religious leaders to advise, mentor, and tutor young people at those sports sites; network with corporate and government agencies to establish apprenticeship and job opportunities; and bring in students of sport and society who understand and can articulate the applicability of the great lessons and dynamics of black youths'

sports success and achievement to their life circumstances and goals more generally.

Far from de-emphasizing or abandoning sport, or simply allowing our involvement to wane, black people must now more than ever intelligently, constructively, and proactively pursue sports involvement. We cannot afford to wait passively for better times or allow ourselves to be swept and herded along in the flow of events and developments at the interface of race, sports, and society. We must understand the forces threatening black sports participation while also recognizing that black sports participation need not become an obsession or preoccupation.

Today it is desirable, even necessary, that black youths and black society as a whole continue to harbor dreams of

achieving excellence in sports — there is much to be learned and gained from both the challenges of sports competition and the experiences of meeting those challenges. But all involved must learn to

dream with their eyes open, always remaining fully cognizant of participation's pitfalls no less than its positive possibilities, of its potential as a dead-end trap no less than its promise as a vehicle for outreach and advancement. As in the past, the responsibility for perpetually mapping the sports terrain and for the ongoing acculturation and education of black youths as they seek to productively navigate the possibilities of athletic achievement fall most heavily upon black people themselves.

In the final analysis, exploiting black youths' overemphasis on sports participation and achievement may be our only remaining avenue for guiding increasing numbers of them out of circumstances that today lead to even more devastating destructiveness and a greater waste of human potential than that which I, and others, have long decried in connection with unrealistic black sports aspirations.

Not at all coincidentally, it could also salvage the golden age of black sports participation.

Dr. Harry Edwards is a professor at the University of California, Berkeley who has written widely about minority participation in school, college, and professional sports.

More than ever, black people must now intelligently and constructively pursue sports involvement

A TROUBLING RESPONSE TO OVERCROWDED PRISONS

The Prison Litigation Reform Act of 1995

By Elizabeth Alexander

Before 1980 criminologists debated two popular theories about incarceration rates. One school held that a particular society has a stable level of crime; the other, that a specific society has a stable level of imprisonment. One of the standard pieces of evidence cited to support the latter theory was imprisonment rates in the United States. Between 1890 and 1972 the imprisonment rate remained relatively steady: it reached a low in 1923 at approximately 98 sentenced adult prisoners per 100,000 people, and a high in 1933 with approximately 151 prisoners per 100,000 people. The 1972 rate was 131.7 prisoners per 100,000 people.

The Incarceration Boom in the United States

After 1980 something dramatic happened. The US incarceration rate started climbing, and it has continued to climb. Our current incarceration rate is approximately 450 sentenced prisoners for every 100,000 people. In contrast, most other industrialized countries resemble the United States before 1970. For particular subgroups of prisoners the picture is far worse. For African Americans the rate is just under 2000 sentenced prisoners per 100,000 population. In 1992 over half of all African-American men in Baltimore aged 18-35 on any given day were under some form of control by the criminal justice system.

Aside from the long-range social effects of this situation, we have not yet fully experienced its direct fiscal effect. In 1995 governmental units collectively allocated 5.1 billion

dollars for the construction of new prison and jail space, even though every one hundred million dollars in construction will cost 1.6 billion over the next three decades in finance charges and operational costs.

The dramatic increase in incarceration rates cannot be explained by our crime rates. Homicide rates in the United States are much higher than those of comparable countries, but homicide convictions account for an insignificant number of sentenced prisoners. In general, other crime rates in the United States are high, but they remain in ranges that overlap with comparable rates in other countries—for example, one can point to industrialized countries with higher auto theft rates than the United States. And while there is much contested terrain about changes in U.S. crime rates since 1970, it is generally conceded that the crime rates have not changed dramatically and that movements up and down in the incarceration rate have not correlated with crime rate changes.

What has changed are policy decisions about who to lock up. Since 1980, 84 percent of the increase in State and Federal prison admissions has occurred among non-violent offenders. A third of the increase is due to incarcerating drug offenders. The United States now has a higher rate of incarceration for drug offenses than its average rate of incarceration for all offenses between 1920 and 1970.

From the late 1970s on, incarceration rates rose dramatically because prosecution and sentencing policies changed. Most of those changes involved legislative policy, but parole board actions and discretionary judicial sen-

tencing practices also contributed to the increase. In the most general sense, the attitudes reflected in those changes seem to include the beliefs that crime is rampant in the United States, that the typical criminal is violent and different from other people, and that the solution is to lock enough criminals up.

The extraordinary increases in incarceration in this country since 1980 reflect those attitudes; at the same time, those same increases make it far more difficult and expensive to maintain living conditions within prisons that meet minimum standards of decency. As a result, since 1980 most states have one or more of their prisons or their entire prison system under orders from the Federal courts to maintain minimum constitutional standards.

Passage of the Prison Litigation Reform Act

Most of the legislative enactments reflecting public attitudes about the criminal justice system since 1980 have had the effect of increasing sentences for convicted criminals. However, since 1994 Congress has developed additional ways to achieve its policy goals, culminating in the passage of the Prison Litigation Reform Act of 1995 (PLRA).

The legislative parent of the PLRA was a little-noticed section of the Violent Crime Control and Enforcement Act of 1994 popularly known as the Helms Amendment. The Helms Amendment provided that a "Federal court shall not hold prison or jail crowding unconstitutional under the Constitution except to the extent that an individual plaintiff proves that the crowding causes the infliction of cruel and unusual punishment on that inmate." In one sense, the statute was an entirely symbolic act. It was already the law that no prisoner could succeed in obtaining an order from a court based on a constitutional violation without proving a constitutional violation, and the Act itself had no effect on prison litigation.

But the concept expressed in the Act — that Congress can define for Federal courts the circumstances under which the courts can determine or remedy a constitutional violation — is extremely important, particularly so when combined with another provision of the Helms Amendment that allowed prison officials to ask a Federal court to reconsider court orders based on overcrowding every two years. This provision also seemed unimportant on its face because, in Federal court, any party can at any time ask the court to end a prison overcrowding order or any other injunctive order (an order telling a defendant in a civil suit to do something the court requires, or to stop doing something wrong) if the party meets the legal standard for gaining a change in the order. But lurking in these two sections, which together had literally no impact in the law, was the germ of the PLRA.

The heart of the PLRA, which became effective in April 1996, is the provision that prohibits a Federal court from issuing an injunctive order related to prison conditions based on a violation of the Constitution or Federal statute unless the order satisfies four standards: (1) the order is narrowly drawn; (2) it extends no further than necessary to correct the violation of the Constitution; (3) it is the least intrusive means necessary; and (4) it gives substantial weight to any adverse impact on public safety or the operation of the criminal justice system.

If this were the only provision of the PLRA, it would have had little impact. The standards in PLRA are not noticeably different from what Federal courts currently require, and for new orders issued after the passage of PLRA judges can make clear that they have decided that the PLRA standard is met. What the PLRA also purports to do, however, is to end all past injunctive orders unless they contained such specific written conclusions by the judge, or unless the judge decides that relief remains necessary because of a current and ongoing constitutional violation.

Here the provisions do cause problems. While the required standards are not a change in the law, there were no pre-PLRA orders that happened to recite

precisely those findings, and there are many variants that Congress could add in the future.

Moreover, a very large percentage of injunctive orders in prison cases were entered because the State or local government in charge of the prison or jail agreed to have the court issue an injunction, rather than go to trial. Such injunctions, known as consent decrees, ordinarily contain no findings, and the court record does not show what evidence might have been presented if the case had gone to trial. Under the PLRA, all such consent decrees are dissolved unless the plaintiffs persuade the court that there is a current constitutional violation.

But how do plaintiffs prove a current and ongoing constitutional violation if the prison officials are complying with the injunction? Even if a court were to give the provision the sensible construction that what Congress had to mean was that a "current and ongoing" constitutional violation would exist if the injunction were allowed to lapse, the plaintiffs must immediately prove a constitutional violation in a case in which the judge has no information, or at least no information about current conditions. Typically it takes several years of preparing for trial to bring a big case to trial. Yet, under the PLRA the prison officials can require plaintiffs to re-prove a constitutional violation once a year, and if the Court has not decided a pending motion within 30-90 days, the officials are entitled to have the entire injunction put on hold (stayed).

After 1980, incarceration rates began climbing dramatically



The Constitutional Controversy

All over the country, the constitutionality of various provisions of the PLRA have been challenged in Federal court. These challenges take place in the context of a broader argument over the core structure of our government. The United States is a democracy, yet in the Bill of Rights the Constitution also incorporates certain limits upon our democracy. Under our Bill of Rights, no matter how unpopular a particular group is at any time, the majority is prohibited from taking from the minority those freedoms that the Constitution itself protects.

The principle that the Constitution serves both to protect our democracy, but also to place certain powers beyond the control of a transient majority, is not particularly controversial. What is controversial historically is who decides whether the majority has trampled on rights protected by the Constitution. Indeed, perhaps the most important Supreme Court decision in our history purported to answer that question. In *Marbury v. Madison*, in 1803, the Supreme Court ruled that the Federal courts, not Congress, ultimately have the power to determine whether particular legislative acts are constitutional because the Constitution is “a superior paramount law, unchangeable by ordinary means.”

Federal courts are to recognize and give heed to the Constitution when it clashes with mere ordinary legislation because “it is emphatically the province and duty of the judicial department to say what law is.”

Although *Marbury* officially settled the issue, the results in *Marbury* and in another case, *Martin v. Hunter's Lessee*, which announced the right of the Supreme Court to strike down State statutes as unconstitutional, have never been entirely lacking in controversy. The same constitutional struggle fueled arguments between Federalist judges and Jeffersonian Democrats, as well as debates in the Civil War, the New Deal, and the civil rights eras, when legislators denounced what they called “forced busing” ordered by Federal courts. During times of heightened political tension, Congress has attempted to test the decision in *Marbury* through a variety of means designed to prevent the Federal courts from holding its acts unconstitutional.

The PLRA is the latest stage of this ongoing political

fight, generally known as “court stripping.” Since the busing debates, most of Congress’ attempts to limit the power of the Federal courts have taken the form of attempting to limit the Federal courts’ jurisdiction or their ability to enter effective remedies for constitutional violations; the PLRA certainly falls squarely within that tradition. While a number of Federal trial courts have struck down the part of the PLRA that requires the courts to end injunctions that lack the required findings, so far only one of the six Federal courts of appeals to address the issue has held the provision unconstitutional, while another suggested that certain applications of the provision might be unconstitutional. On the other hand, the stay provision of the PLRA that suspends relief while the court considers a final ruling has fared much more poorly. The great majority of Federal courts to consider challenges to this section have either simply refused to apply it to suspend relief, or have struck down the provision as unconstitutional.

Meanwhile, the partial success of the PLRA has encouraged those who advocate even more substantial “court stripping” aimed at far broader targets. Among the proposals that have been introduced in the current Congress, for example, one would prohibit a single Federal judge from striking down as unconstitutional an act passed by a State referendum, and

Since the busing debates, Congress has attempted to limit judicial power through various “court stripping” measures.

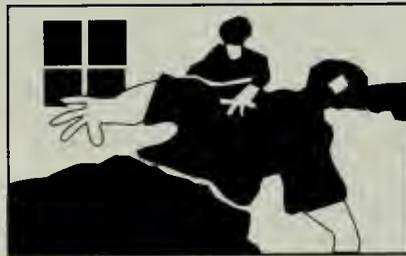
another aims at preventing a Federal judge from remedying a violation of the Constitution if the effect of remedying the violation would be to raise taxes. What these various bills have in common with past attempts at court-stripping is that the bills target specific unpopular decisions by Federal courts and usually decisions that uphold the rights of an unpopular group. But when the PLRA attempts to limit prisoner rights by telling the Federal courts that they must revisit constitutional decisions and re-decide them under the limits Congress sets, it raises fundamental questions about our government that could someday affect the rights of all of us.

Elizabeth Alexander is Director of the National Prison Project of the American Civil Liberties Union Foundation in Washington, DC.

OUTLAWING DOMESTIC VIOLENCE

What's Working and What Isn't

By Pamela Coukos



Four years after the passage of the Violence Against Women Act (VAWA), and well over two decades after the founding of the nation's first battered women's shelters, domestic violence continues to plague women and children in the United States. The VAWA hearings provided a national wake-up call about a shockingly high rate of battering in our society and a sadly inadequate response. Congress documented that our police departments, prosecutors and courts, deeply infected with gender bias, often failed to respond to domestic violence as a crime or blamed the victim for the violence. The VAWA began a major Federal commitment to improving the criminal justice system and services for battered women by providing Federal dollars and encouraging local partnerships among criminal justice systems and victim advocacy organizations.

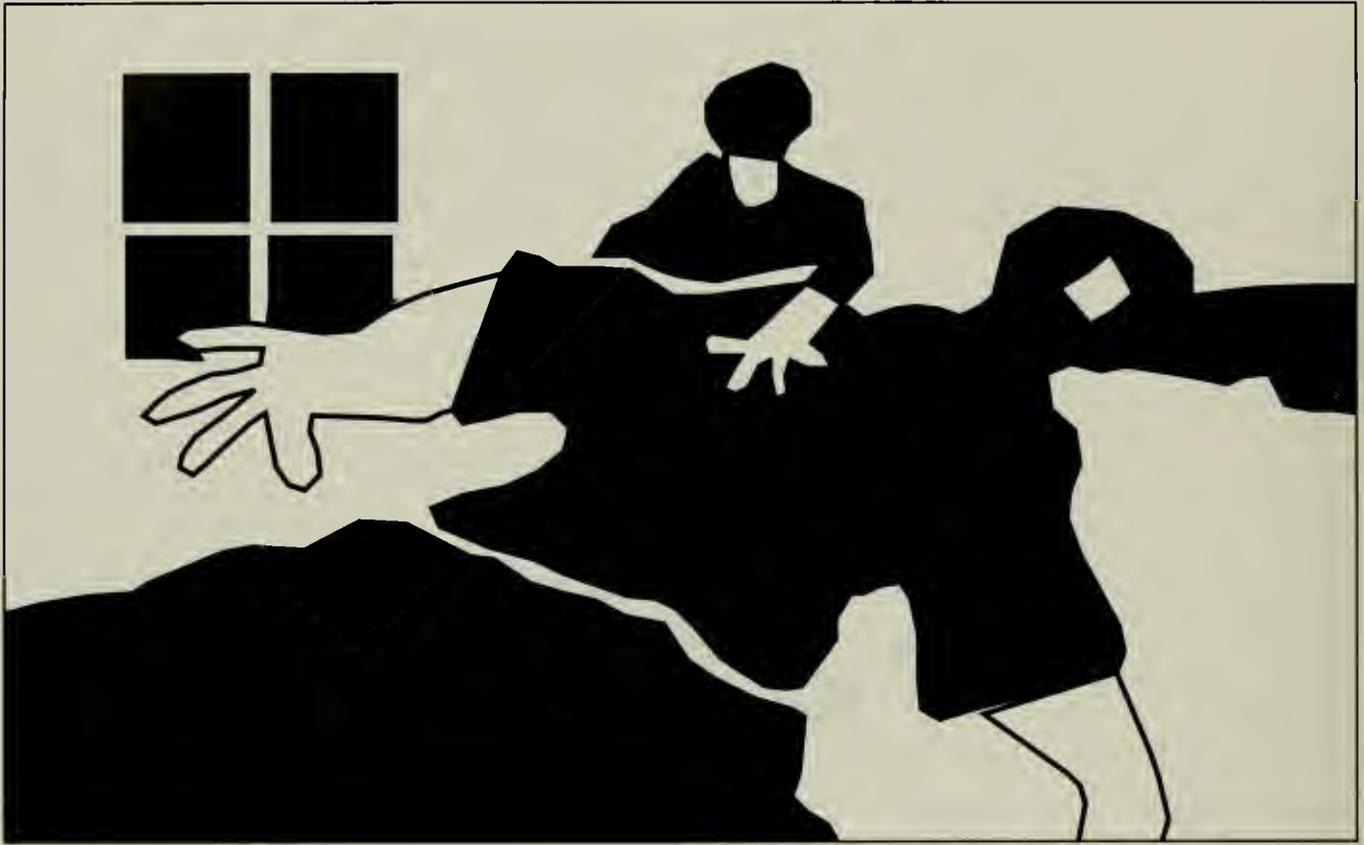
At this juncture, we can report important progress, but tragic deficiencies remain. Communities around the country are experimenting with promising approaches and partnerships. More Americans than ever recognize that domestic violence is a serious and important problem in our society. Local, State, and Federal policymakers place the issue high on their agendas. However, despite this progress, shelters continue to turn away women that they cannot serve, and women are still murdered by intimate partners at a dramatically high rate. Cutbacks in government support for

low-income families are causing serious problems for battered women and their children. Gender bias is still a serious problem in too many State and local criminal and civil justice systems. Thus, a review of the latest developments on domestic violence finds both reasons for hope and causes for concern.

The Nature and Character of Violence Against Women

Any assessment of our response to domestic violence should begin with looking at how prevalent domestic violence remains. Women disproportionately experience intimate partner violence — including physical and sexual abuse committed by current and former spouses, boyfriends, and girlfriends. From spousal battering to acquaintance rape, violence against women and girls largely happens at the hands of someone they know, and usually someone with whom they have a relationship. For example, approximately 37 percent of women seeking injury-related treatment in hospital emergency rooms are there because of injuries inflicted by a current or former spouse or intimate partner (Rand, 1997).

The most recent data from the Department of Justice, which provides a conservative estimate of violent crimes against women, shows how different intimate partner violence is for men and women. (The following are taken



from Greenfeld, 1998, unless noted otherwise).

—Between 1992 and 1996, women and girls experienced on average close to one million incidents of assault, rape, and murder by a current or former intimate partner annually. (Other estimates such as the 1985 National Family Violence Survey found the annual rate to be much higher). During this same period, men experienced only about 150,000 violent crimes by an intimate partner.

— The homicide rate for intimate partner violence has declined dramatically since 1976, but the vast majority of that decline can be attributed to a steep drop in the number of men killed by current or former spouses or intimate partners. Thirty percent of female homicide victims are killed by intimates — a rate that has held steady for the past twenty years.

— Teenage girls (age 16-19) experience one of the highest rates of violence by an intimate partner when compared to other age groups.

— Strangers commit only about one in five incidents of sexual assault against women; friends and acquaintances commit over half of these assaults and intimate partners about one fourth (Bachman and Saltzman, 1995).

In short, the most common perpetrator of physical or sexual violence against a woman is a man known to the woman, often her intimate partner. This pattern has been shown in studies of African-American, Mexican-

American, and white women, and of urban and rural women (Crowell and Burgess, 1996). Further research is needed on intimate partner violence against women of color, lesbians, immigrant women, older women, teenage girls, and women with disabilities.

Policy Responses to Domestic Violence

Because violence against women in the home has been discounted throughout history as a private, “family” matter rather than a crime, reforming the criminal justice system has been a high priority for policy responses to domestic violence. In the past a police officer’s discretion not to arrest an abuser or a prosecutor’s discretion not to prosecute a case was used to duck responsibility for dealing with domestic violence. Today, experiments with “mandatory arrest” or “pro-arrest” and “no-drop prosecution” policies are taking place in many parts of the country.

The results of these new approaches are still being evaluated. Important benefits include eliminating discretion that has been used harmfully in the past and sending a clear statement from Federal, State, and local governments that beating an intimate partner in the home is a crime equivalent to beating a stranger on the street. Some advocates have raised concerns that these mandatory policies harm battered women by removing their choices or placing them

in danger. Women may choose to drop charges or refuse to testify for a variety of reasons, including fear of retribution, concern that if their abuser is jailed there will be no income to support her and her children, or conflicted feelings about turning someone over to a racist or otherwise unfair justice system. A mandatory arrest and prosecution policy may also be manipulated by an abusive partner who calls the police first or brings counter-charges against a partner who has merely tried to defend herself or her children.

However, there is strong agreement that training and education about domestic violence for police, prosecutors, and judges is critical to improved handling of domestic violence cases. Current Federal funding requirements promote increased coordination between advocates in the community and their local criminal justice systems. Unfortunately, this requires overcoming decades of mistrust on one side and inadequacy on the other. In some places, these partnerships are working relatively well, and in other places they remain illusory.

As battered women have traditionally been unable to look to the State for protection, a private community-based network of shelters, safe homes and other services has evolved from the first few shelters established in the early 1970's to over 2,000 programs across the nation. The National Domestic Violence Hotline provides free nationwide crisis assistance, and since its establishment the Hotline has referred thousands of women to shelters and services. Unfortunately, too many counties lack services for battered women; the need for emergency shelter is still greater than the number of beds. Crucial gaps in services include appropriate responses to violence against women in different racial, ethnic and cultural communities, improving legal protections and domestic violence services for lesbians, structural and attitudinal access to services for women with disabilities, removing language barriers, and protecting women in rural areas. Dramatic increases in funding for local shelters and programs have made a real difference in services for battered women and their children, but there is still a clear unmet need.

In addition to improved crisis assistance other high priorities include developing and implementing prevention strategies directed at children and youth and improving longer-term transitional support — such as improved access to affordable housing and steady employment in order to reduce a battered woman's potential dependence on her abuser. Now that more attention has been focused on treating violence in the home as a crime, advocates are looking at the impact that violence has outside the home,

including the impact of domestic violence on the workplace, education, the health care system, and other sectors of society. Although progress has been made in the criminal justice system our civil justice system is lagging behind. Women involved in divorce and custody disputes often find judges and child protection agencies which are insensitive to domestic violence and which penalize women who report abuse.

Recent policy initiatives in many of these areas focus on continued Federal leadership and increased State and local reform. The Violence Against Women Act of 1998 (VAWA2), H.R.3514/S.2110, reauthorizes essential VAWA programs — including funding for shelters and services and support for local criminal justice agencies — but also looks at the effect of domestic violence on children and the need to address violence in the workplace and in schools. VAWA2, currently pending in Congress, also includes provisions aimed at helping older women and women with disabilities, and it provides increased support for sexual assault programs and domestic violence research.

Domestic violence is intimately linked to women's poverty

Welfare "Reform"

Domestic violence is intricately linked to the issue of women's poverty. Abusers may forbid their partners from working or going to school, or sabotage their efforts to become financially independent. Research with women in welfare-to-work programs documents a high rate of domestic violence as well as common techniques of batterers. These techniques range from stealing clothes, to constant telephone harassment at work, to keeping a woman up the night before a key exam, to inflicting visible injuries that might prevent her from going out (Raphael, 1996).

Because abusers may control the family finances, a woman may be forced to flee with not much more than the clothes on her back. Women escaping domestic violence have looked to welfare and other benefits programs — including food stamps and housing — as their literal "safety net."

In 1996 Congress reformed Federal welfare laws, limiting the amount of time a woman can receive welfare benefits, and requiring that individuals work while receiving benefits. Some States now require that a person be a State resident for a certain period of time before receiving welfare benefits. These changes affect battered women and their families dramatically. New work requirements and time limits mean that women using welfare to escape domestic violence will face higher hurdles. Further, if their current or former partners try to prevent them from work-

ing or keeping a job, these women are now more likely to be sanctioned and lose their benefits. New rules imposing residency requirements may unfairly penalize women and families who move across State lines to flee abusive partners.

To address these problems, the 1996 Welfare Reform Act included the Family Violence Option (FVO). The FVO allows States to waive, on a case-by-case basis, requirements that might make it more difficult for a person to escape domestic violence, or that under the circumstances constitute an unfair penalty. The FVO also has provisions for screening and providing welfare applicants referral to domestic services. As of May of 1998, about half of the States had adopted some form of the FVO. It remains to be seen whether States appropriately implement this provision. Welfare caseworkers will need domestic violence training. Procedures for safe and confidential assessments are still being developed. However, the FVO provides an important opportunity for domestic violence advocates to get involved in their State and local welfare agencies, and make those agencies more responsive to the needs of battered women

Viewing Domestic Violence As a Civil Rights Violation

One of the most exciting public policy approaches to domestic violence is the evolving use of civil rights laws and remedies. Viewing domestic violence, sexual assault and other forms of violence against women as potential gender-motivated acts of violence allows the use of civil rights remedies against the perpetrators. In the VAWA, Congress created a civil rights remedy for domestic violence, allowing a person to sue her rapist or batterer for violating her right to be free of gender-motivated violence (42 U.S.C. 13981). A growing number of States include gender in their State hate crimes laws (Anti-Defamation League, 1998), and pending Federal legislation would add gender to 18 U.S.C. 245, the Federal bias crime statute (H.R. 3081/S. 1529).

Discrimination against women is an important factor in the perpetuation of domestic violence. Batterers may view women as inferior and as deserving to be beaten. It is important to respond to this discrimination by recognizing domestic violence as a violation of a woman's civil rights. In addition, focusing on the potential motivation of the perpetrator (showing a discriminatory motivation is a requirement of civil rights statutes) makes it harder to blame the woman for provoking or for failing to escape the

abuse she experiences.

Recent cases in Massachusetts and Maine against "serial batterers" demonstrate the possibilities of this approach. State civil rights laws were used against individuals who victimized multiple women, in cases involving gender-based epithets, serious forms of physical and sexual violence, and a clear pattern of abusing women. These types of cases allow Statewide remedies, including injunctions that protect a whole class of women from the perpetrator. They also highlight the gender-motivated nature of the crime, and make clear that the State will not tolerate discriminatory acts of violence against women.

Conclusion

Political leaders at all levels increasingly consider domestic violence a top policy priority. This provides an important opportunity to press for even more improvements in our society's response to battering. Because women and children continue to suffer injury and death every day, we must continue our struggle for an end to domestic violence.

Domestic violence is a violation of a woman's civil rights

Pamela Coukos, who has long been involved in litigation, legislative drafting and public education concerning violence against women and women's

civil rights, was Public Policy Director of the National Coalition Against Domestic Violence when she wrote this article for the Civil Rights Journal. She is now associated with Mehri, Malkin & Ross, P.L.L.C., a Washington, DC law firm.

Resources

Anti-Defamation League, *Hate Crimes Laws* (1998).

Ronnet Bachman and Linda E. Saltzman, *Violence Against Women: Estimates From the Redesigned Survey* (Bureau of Justice Statistics, 1995).

Nancy A. Crowell and Ann W. Burgess, eds., *Understanding Violence Against Women* (National Research Council, 1996).

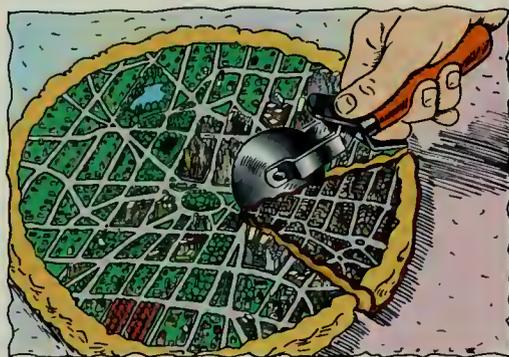
Lawrence A. Greenfeld, et al, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends and Girlfriends*, (Bureau of Justice Statistics, 1998).

Michael Rand, *Violence-Related Injuries Treated in Hospital Emergency Room Departments* (Bureau of Justice Statistics, 1997).

Jody Raphael, *Prisoners of Abuse: Domestic Violence and Welfare Receipt* (Taylor Institute, 1996).

SERVICE REDLINING

The New Jim Crow?



By Chevon Fuller

Service redlining is the practice of refusing to offer goods or services to residents of low-income, minority neighborhoods. African Americans, Latinos, and other ethnic groups typically characterize the segregated areas. The result is disturbing and familiar: some retail establishments are creating demographic-based service policies which, like Jim Crow laws, enable them to do business only with white communities.

Delivery Services

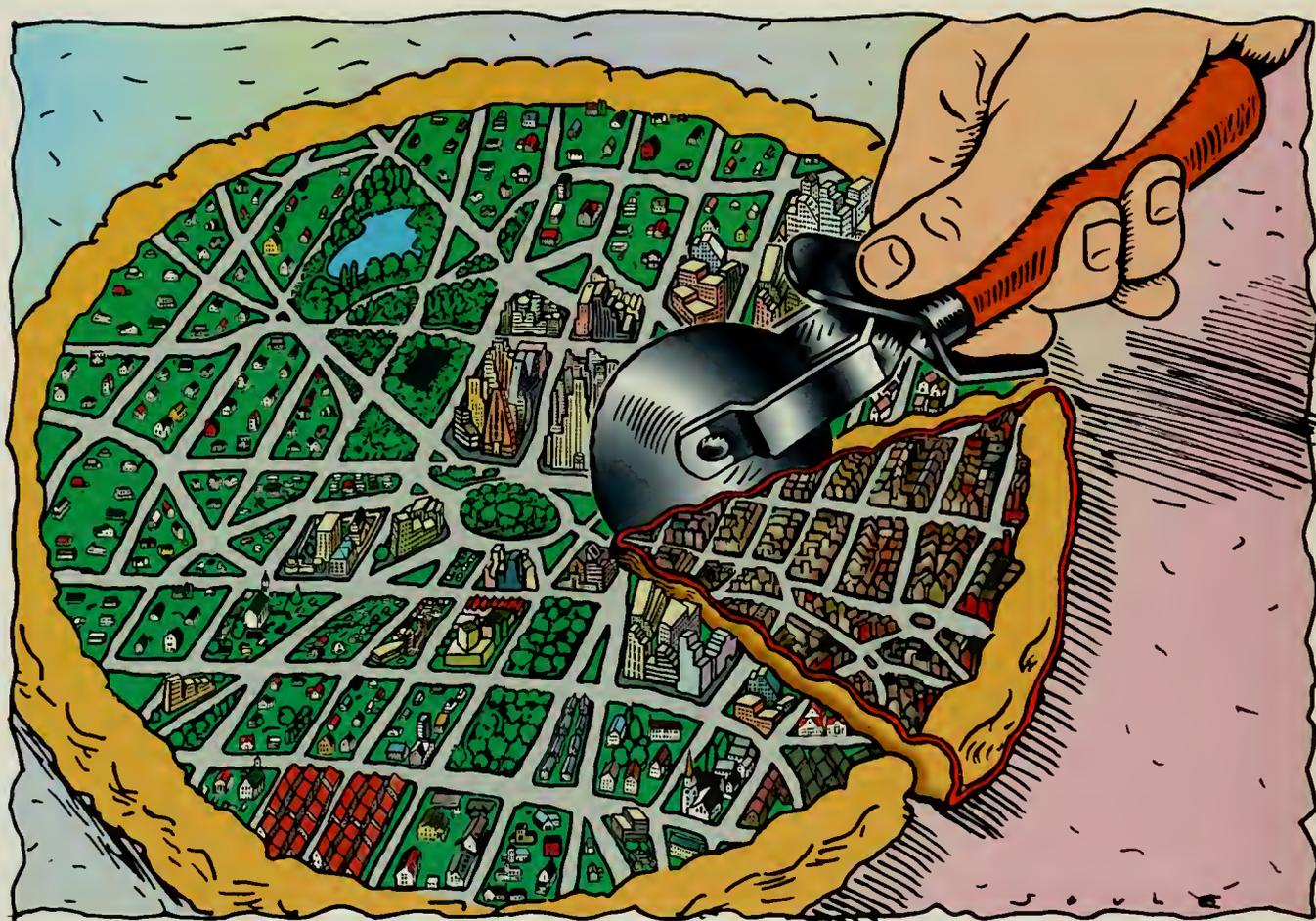
James Robinson remembers vividly the days when African Americans were refused service in public places: in 1950, “when you went to the bus station [in the south], there was a line for blacks and a line for whites. In the restaurants, there were [separate] sections for blacks and [for] whites. White people laughed — they didn’t take our anger seriously,” Mr. Robinson recalls.

Almost fifty years later and despite myriad laws prohibiting such conduct, Mr. Robinson and his wife Joyce today have that same angry feeling. In November 1997, the Robinsons, who live in American Beach, Florida, sued Domino’s Pizza because the company refused to deliver a pizza to them for security reasons. Although the pizza giant made residential deliveries to neighboring white communities, it had established a drop-off location for residents of

American Beach. All but four residents of American Beach were African American. Domino’s claimed that it had established the policy after speaking with law enforcement personnel and reviewing police crime statistics. However, the county sheriff disagreed, stating publicly that there was no additional danger in American Beach. “When my wife called Domino’s last year, it took me back to the old days,” Mr. Robinson recalled. “The guy [from Domino’s] acted like he was happy” about refusing to serve the predominately black American Beach.

The Robinsons accused Domino’s of establishing a redlining policy which violates the public accommodations provisions of the Civil Rights Act of 1964. In February 1998, the court directed Domino’s to provide service to the area it had segregated. But to Mr. Robinson, the court’s decision was bittersweet. “In 1998 I have to go through all this to get an \$8.00 pizza? No, I’m not happy,” remarked Mr. Robinson. “It’s all over Jacksonville, Florida. But, if the people don’t rise, nothing will be done.”

In a similar case, in February 1997, Pizza Hut refused to deliver 40 pizzas to an honors program at Paseo High School in Kansas City, Missouri because it considered the school to be located in an unsafe neighborhood. Rob Doughty, vice president and spokesperson for Pizza Hut Inc., was quoted as saying, “There is hardly a town that does not have a restricted area.”



Ironically, Pizza Hut regularly delivered pizzas to Paseo High School under the terms of a school lunch contract. Although the school board subsequently canceled the \$170,000 contract with Pizza Hut, the impact of the company's treatment of the students weighed heavily on the minds of those involved. "If we are going to support you [through district contracts], we need you to provide services to our kids," Deputy Superintendent Phyllis Chase said.

There is no disputing that the consequences of forcing residential delivery in unsafe circumstances can be deadly. In 1995, the Bureau of Labor Statistics ranked "driver sales worker" as one of the most deadly jobs in the United States. Because of such statistics, pizza companies across the nation deny service to certain neighborhoods. Domino's spokesperson Maggie Monaghan says that crime "makes [Domino's] a victim as well."

Pizza deliverers have been beaten and killed — but such incidents do not take place exclusively in inner-city communities. In April 1997, pizza deliverers Georgia Gallara and Jeremy Giordano were killed when they answered a call which lead them to an abandoned house in suburban Sussex County, New Jersey. The Domino's and Pizza Hut disputes underscore the point that businesses often base service redlining more on stereotypes than on fact.

Retail Services

In March 1996, Dorothy Hudson called Americar to reserve a van to drive to her father's funeral. The company refused to rent to her because she "lived in a high crime, high risk area" of town. In February 1997, Delores Howard was told the same thing. Americar calls it a business decision. Ms. Howard, the mother of a slain Syracuse police officer, calls it discrimination. "It's a shame that we have to sue to be treated equally. I was in shock when this happened. I felt like nothing. Crime is everywhere. My son Walley died trying to get drugs off the streets, not for black, white, or Jewish people, but for everyone. Then, [Americar] tells me that I can't rent a car. It was a kick in the face."

To carry out its policy, Americar created a map outlining redlined areas. Rental agents refused cars to persons who lived in the red, "high risk rental" areas on the map. Rental agents used heightened scrutiny for customers who lived in the yellow, "use caution" areas on the map.

Most of the redlined areas lay at the heart of inner-city Syracuse, New York, but Americar also redlined a nearby Native American reservation. Not surprisingly, African Americans, Latinos, and Native Americans constitute a

significant portion of the population that makes up the redlined areas. Chief Irving Powless of the Onondaga Indian Nation near Syracuse, New York stated that, "Americar has no basis for a refusal. If you think about a group and you say that you are not going to do business with them, that is discrimination. If I walk into Americar and they say, sorry, you can't rent because you are a Native American," who resides on the reservation, that is discrimination.

In August 1997, New York's Attorney General Dennis C. Vacco sued Americar for violating State and Federal civil rights laws by maintaining a carefully crafted combination of service redlining, heightened scrutiny, and racial bias to decide who would be eligible to rent its vehicles. Although Americar claimed that its rental policies were based on crime rates in particular neighborhoods, the complaint charges that its rental policies, in reality, have more to do with the ethnic origin or skin colors of neighborhood residents than security. The large redlined zones were based on arbitrary reviews of news articles describing local crimes and encompassed only predominantly African American, Latino, and Native American communities.

In Pennsylvania, Avis Rent-A-Car, Inc. has also been accused of refusing to rent cars to local minority customers. Although the company claims it has "zero tolerance" for discrimination, in October 1997 the Pennsylvania Attorney General filed a complaint against Avis with that State's Human Relations Commission (which is still pending) to stop the alleged redlining practice. Avis has also come under close government scrutiny for alleged discrimination in New York and in Florida.

Remedies

The Domino's and Americar cases help define the sometimes blurred distinction between a legitimate nondiscriminatory policy and intentional discrimination. Thorough fact investigation and analysis will make clear whether a seemingly neutral, security-prompted geographic policy is in fact driven by stereotypes or tainted with prejudice.

In 1996, the San Francisco Board of Supervisors approved the nation's first service redlining law. The ordinance followed the murder of Samuel Reyes, a 22-year-old Domino's pizza deliverer, and the pizza company's subsequent refusal to serve San Francisco's high-crime neighborhoods. The ordinance makes it unlawful for a business which regularly advertises residential delivery services to

the entire city to refuse to serve any address within the city. Businesses may exclude a certain address if a customer has refused to pay or if the business has a good faith reason to believe that providing delivery service to that address would expose its employees to an unreasonable risk of harm.

Undoubtedly, the San Francisco ordinance permits some neighborhoods to be redlined to the extent that a company can demonstrate good faith reasons to refuse service. Yet, the ordinance is a first step towards making businesses accountable for redlining policies.

Linda Hall, the Executive Director of the Syracuse, New York Human Rights Commission believes that people must take action to stop such treatment. "People have to speak up about unfair treatment and give us the opportunity to fully investigate these situations" and bring lawsuits, explained Ms. Hall. "We have to network, find patterns of discrimination," and eliminate them.

Businesses with safety or property damage issues which prevent them from servicing certain neighborhoods must

work with community leaders to find creative solutions, rather than turning to widespread demographic-based service redlining as the only alternative. In 1996, Domino's in San Francisco

toured a redlined neighborhood and altered its policy to provide service to almost 2/3 of the area it had previously redlined. Domino's spokesperson Maggie Monaghan admitted that "in some cases, we have not evaluated the area enough. It is very important that we do." She admits that, "there is a new, heightened awareness" because of the publicity over recent disputes.

Conclusion

Even where nondiscriminatory reasons for service redlining exist, redlining has a substantial social and economic impact on the segregated communities. As service markets expand, we can expect that service redlining will increase. In response, we must sue, enact appropriate legislation, and create innovative, community-based solutions to insure that entire communities are not left to pay for the sins of a few.

Chevon Fuller is Chief of the New York State Attorney General's Civil Rights Bureau. The opinions and analysis in the article are those of the author, and do not reflect the opinions, positions, or policies of New York State Attorney General Dennis C. Vacco, or of the New York State Department of Law.

THIS WAY?

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

THE EQUAL ACCESS ACT:
LEAVE WELL ENOUGH ALONE

By Richard T. Foltin

The Equal Access Act of 1984 (EAA), which gave students in public high schools the right to form religious clubs on the same basis as other clubs, provoked heated debate when it was first proposed but has proven relatively uncontroversial in practice. Now Congress is considering various proposals to enhance the EAA, and many of the people who took up the fight for and against it fourteen years ago are again entering the debate. We asked two of the more thoughtful scholars on opposing sides to give us a brief recap of the Act and outline what they believe is at stake in today's battle.

A preamble in the nature of full disclosure. During the early 1980s, a battle was fought in the U.S. Congress over proposed legislation guaranteeing the right to students in Federally-funded public secondary schools to form religious clubs on the same basis as other school clubs. The American Jewish Committee, the organization for which I work, opposed that legislation. We were on the losing end of that battle. The summer of 1998 marks fourteen years since the Equal Access Act was signed into law by President Ronald Reagan, following its passage in both Houses of Congress by substantial margins, 88 – 11 in the Senate and 337–77 in the House of Representatives. And two years later, by a vote of 8 – 1, the U.S. Supreme Court ruled in the case of *Board of Education of the Westside Community Schools v. Mergens* that the Equal Access Act did not violate the principle of separation of church and State encompassed in the First Amendment to the Constitution. I wrote the amicus curiae brief submitted by AJC in the case, one of several briefs making that unsuccessful constitutional claim.

The Equal Access Act provides, in brief, that when public secondary schools allow “noncurriculum related student groups” to meet on school premises during “noninstructional time” (thereby creating what the Act defines as a “limited open forum”) they may not deny the same opportunity to other students who wish to meet on the basis of the religious, political, philosophical or other content of the speech at those meetings. This approach borrows from the concept of “limited public forum” to be found in free speech jurisprudence which holds that, while government has no obligation to afford access to its property for expressive activity, it may not — once it does allow

for such activity — exclude anyone from the use of that property on the basis of the content of their speech. The provisions of the Equal Access Act directing that a “limited open forum” is created in public schools under certain circumstances does not, however, necessarily mean that secondary schools, in allowing for noncurricular clubs, have created a constitutional “limited public forum.” The Supreme Court has not definitively addressed that question and it remains an issue of dispute to this day.

With the failure of the judicial challenge, a number of religious, civil liberties, and education groups that had been in contention — some who had supported the Equal Access Act, some who had opposed it, and some neutral — came together to prepare a pamphlet designed to provide guidance to school administrators, teachers and parents in understanding what the Equal Access Act required of them. The pamphlet pointed out that there were three basic concepts underlying the Act. The first concept was nondiscrimination: in the context of secondary school clubs meeting at “noninstructional time,” religious speech should receive equal treatment — but not preferred treatment — as compared to other forms of speech. The second concept was that it was student-initiated and student-led meetings that were being protected, not official school prayer or other actions amounting to government endorsement of religion that were forbidden under judicial precedent. Quite to the contrary. In order to avoid an appearance of official school sponsorship of religion, the Act explicitly stated that the rules under which a school establishes a “limited open forum” must provide that “employees or agents of the school or government are pre-

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OR THIS WAY?

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

THE EQUAL ACCESS ACT: MAKE IT MORE EFFECTIVE

By Jay Alan Sekulow

The First Amendment prohibits Congress from making any law abridging the freedom of speech. The amendment makes no exception for religious speech. But sometime between 1791 (when the First Amendment was ratified) and the present, the strange notion entered into our nation's jurisprudence that the First Amendment's Establishment Clause not only allowed but perhaps required public officials to abridge citizens' right to express their religious views on public property lest observers think that the government was endorsing religion. That notion became especially ingrained in our nation's public schools; according to a 1984 Senate Judiciary report,

[school] districts have banned student-initiated extracurricular religious clubs, certain student community service organizations and activities (including dances to benefit the American Cancer Society), student newspaper articles on religious topics, and student art with religious themes. They have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal Bibles on school property. Individual students have been forbidden to say a blessing over their lunch or recite the rosary silently on the school bus.

This desire to extirpate student religious speech and association from public schools was often justified by an expressed desire to "protect" the ability of "impressionable young people" to form their own religious views free from any "corrupting" influence of the State. How that could be seen to justify censoring student religious speech (which,

after all, is by definition not the State's speech) was best explained in a 1980 Second Circuit case:

To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the State has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of the school.

Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980).

In reaction to this hostility to students' religious speech and association rights, Congress in 1984 passed the Equal Access Act, 20 U.S.C. 4071-74 (1988). The Equal Access Act makes it unlawful for a public secondary school which receives Federal financial assistance and has a limited open forum to discriminate against any student who wishes to conduct a meeting within the forum based on the content of the speech, be it religious, philosophical, or otherwise. In other words, the Act provides that a school receiving Federal funds must allow students who wish to pray or discuss religion the same right to use school facilities for their meetings as other extracurricular groups have.

The Supreme Court in *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) upheld the Act and rejected the argument that the Act violates the Establishment Clause. *Mergens* and the Act itself reject the notion that

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sent at religious meetings only in a nonparticipatory capacity.” The final concept was that of local control; school officials retain the authority to maintain order and discipline and take other actions necessary to protect the well-being of the student body.

Opponents of the Equal Access Act did not so much fear what the Act allowed on its face — student clubs formed to address religious, political, or philosophical issues — as the abuses that they feared would occur if those who felt deeply that it is their sacred obligation to win over others to their own faith used religious clubs formed under the Act as a base for proselytization. This fear was not without basis. Prior to the passage of the Equal Access Act, and continuing to this day, many school districts across the country have engaged in scofflaw school-sponsored organized prayer and devotional Bible readings, scofflaw actions in plain violation of rulings of the Supreme Court and the lower courts. Even before passage of the Act, evangelical groups were allowed entry to public schools, nominally for the purpose of teaching youngsters about the evils of drugs and alcohol, to preach their gospel at student assemblies.

It was against this framework of violations of clear constitutional prohibitions that a number of groups opposed the Equal Access Act and later challenged it as unconstitutional. The guiding principle for those challenges was that parents who enroll their children in public secondary schools for the secular education mandated by the State have a right to expect that their children will not be proselytized away from their own cherished faith and into another, which may be anathema to them, while under the roof of the public school. Children in public schools are, in an important sense, a captive audience, the argument went, and, as such, it is simply not right that they be spiritually seduced, even by sincere and well-meaning fellow students. In addition, opponents of the Act pointed to its provisions allowing adult clergy to enter the public schools and attend student religious club meetings — provided only that they not attend regularly, or direct or control the student religious meetings — as likely to be misused by missionary churches or religious cults that would use student surrogates to, in effect, open branches in public schools.

The Equal Access Act has unquestionably wrought

important changes on the face of religion in public schools. More than at any time since the Supreme Court’s 1963 ruling barring compulsory school prayer, religion has returned to the public schools. Students are forming religious clubs in as many as one in four schools. But the parade of horrors that it was predicted the Equal Access Act would bring have, by and large, not transpired. While noting that some cases of harassment and undue influence by outsiders have been reported, Barry Lynn, executive director of Americans United for Separation of Church and State, recently told *Time* magazine that “in most school districts, students are spontaneously forming clubs and acting upon their own and not outsiders’ religious agendas.”

The intervening years have also brought some greater understanding to one-time opponents of the Equal Access Act as to why so many people — including many who are generally stalwart supporters of the separation of church and State — thought the Act was necessary. As the Supreme Court noted in *Mergens*, the Equal Access Act

was Congress’ response to a “perceived widespread discrimination” against religious speech in public schools because students were barred from forming religious clubs or engaging in religious speech even as they were allowed to form clubs

or engage in speech dedicated to a range of other political and philosophical concerns. Opposition to any action of school officials that endorses religious activity or doctrine or coerces participation in religious activity must be joined with due regard for the right of students to express their personal religious views or beliefs on the same basis that they express other views and beliefs.

At the same time, at least some proponents of religious clubs in public schools have come to recognize that official school prayer has no place in an increasingly diverse society. A recent article in the *Washington Post*, noting the proliferation of religious clubs in public schools in the wake of the Equal Access Act, cited a comment by Benny Proffitt, the Southern Baptist founder of First Priority, a church group that helps Christian students set up religious clubs at their schools. “After World War II, the world came to America,” said Proffitt. “We could no longer take for granted that everyone was Christian. How do you mandate Christian prayer when the whole country has changed? ... I don’t want mandated religion.”

The need to balance the right to engage in religious

Opponents of the EAA did not fear what the Act allowed on its face, but the abuses that might ensue.

expression with protection against government endorsement of religion was well set out in the guidelines on religion in the public schools released by the U.S. Department of Education in 1995 with the endorsement of a broad array of religious and civil liberties groups. In a speech he made shortly before the original release of the guidelines (they were reissued this year to reflect later judicial developments), President Clinton asserted that “nothing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left at the schoolhouse door.”

With the benefit of hindsight, then, this writer would not oppose the Equal Access Act were it brought up for a vote today. But the reality of inappropriate religious practices in public schools, practices that make outsiders of members of minority religious faiths, has not gone away, and that reality cautions against proposals to make the Act even more far-reaching. For thirty-five years, until restrained by the order of a Federal district judge last year, an Alabama school district persisted in an open and flagrant defiance of the constitutional ban on officially sponsored prayer. In another well-publicized case, a Mississippi school engaged in a practice of broadcasting prayers over the intercom; when she protested, the mother of children attending that school was subjected to an ongoing pattern of harassment. In other instances, schools have instituted classes that, in the guise of teaching “about religion,” are nothing more than officially sponsored lessons in a particular faith’s perspective.

It would be a mistake, then, to alter the Equal Access Act so as to afford religious expression preferential treatment as opposed to treatment comparable to that afforded to other forms of expression. As noted earlier, the Act affords students the right to form religious clubs only when students are allowed to meet in other noncurricular groups. The courts have, to be sure, read the term “non-curriculum-related” narrowly so as to avoid a situation in which school districts avoid their obligation of equal access through arbitrary determinations as to which clubs are curricular and which are noncurricular. But local school boards should continue to have the exclusive authority to determine whether or not they will create or maintain a “limited public forum,” as defined by the Act. The determination of a school board not to allow any noncurriculum-related clubs at all may or may not be wise under the circumstances, but it is not, as has been suggested, an “end run” around the Act. It is, instead, consistent with the principles of nondiscrimination and local control that are a central part of the Act. And it is an option that ought to be

available to a school board when noncurricular clubs become vehicles of abuse and harassment rather than a means to allow some students to engage in nondisruptive and noncoercive expression.

Similarly, the Act’s invocation of equal access principles should only be triggered by noncurriculum-related groups that meet during noninstructional time; those principles ought not to be extended to instructional parts of the day. (Noninstructional time need not necessarily be at the beginning or end of a school day. Courts have held, and the Department of Education guidelines reflect, that a lunch period or recess is “noninstructional time.”) While there is no definitive authority as to the constitutionality of allowing or disallowing student religious clubs to meet during instructional time, clubs that meet during class hours should more properly be regarded as carrying out the educational mission of the school. As such, the risk that a school administration will come to be regarded as supportive of a particular religious perspective will be that much greater if religious clubs meet during those hours.

Finally, in considering changes to the Equal Access Act, it should be recalled that the Act is narrowly focused on only one form of expression in which students may be engaged, the meeting of student groups. Other forms of religious expression, such as “see you at the flagpole” gatherings, moments taken by individual or small groups of students to engage in voluntary prayer, or the distribution of religious literature, are protected to the same extent as other forms of expression—and are available to students with or without any changes in the Equal Access Act.

In sum, the last few years have seen a sea of changes in attitudes toward religion in the public schools. This is due in no small part to the greater clarity as to what forms of religious expression are—and are not—appropriate in the public school setting that has grown out of the Equal Access Act, especially when the law is viewed in conjunction with the Department of Education guidelines on religion in the public schools. If, in the view of some, the system was “broke” at one time, it is working well now. Let us not be in a rush to “fix it” once again.

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the Establishment Clause provides an excuse for discriminating against students' religious speech and association rights. And, happily, discrimination against student religious speech has decreased since the Act's passage. However, my experience as a lawyer defending religious speech rights has taught me that not all school administrators have gotten the message. Thus, the Act has fallen somewhat short of its lofty purpose to rid the public school system of discrimination against students' religious speech rights. Whether because of ignorance, misunderstanding, or (though I hope not) malice, some school administrators still seem to adhere to the pre-Act "mere appearance" theory enunciated in *Brandon v. Board of Education*. This belief has prompted administrators to formulate school policies which attempt to skirt the Act's requirements, and, if allowed, could seriously undermine the Act's purpose.

Unfortunately, the lack of clarity or failure to address questions in some portions of the Act have encouraged those policies. One example involves attempts by schools to justify denying equal access to student religious groups because such access would violate State constitutional provisions forbidding aid to religion. This argument arises from 20 U.S.C. 4071 (d) (5) & (7), which provide that "[n]othing in the [Act] shall be construed to authorize the United States or any State or political subdivision thereof . . . (5) to sanction meetings that are *otherwise unlawful* . . . [or] (7) to abridge the constitutional rights of any person." While it seems clear enough that the Supremacy Clause of the Constitution does not allow a State constitutional provision to trump a Federal right (so that a State may not violate a Federal free speech right to avoid violating its own Establishment Clause), some have argued that allowing a religious meeting that would violate a State constitutional provision is "otherwise unlawful" within the Act's meaning. If so, there is no conflict between State and Federal law (since the Equal Access Act itself would bow to State law),

and the Supremacy Clause would not require courts to disregard State constitutional provisions (or any other State or local law prohibiting religious meetings on school grounds, for that matter.)

Fortunately, the Ninth Circuit in *Garnett v. Renton School District*, 987 F.2d 641 (9th Cir. 1993), wisely rejected this interpretation of the Act. As the court noted, the word "otherwise" in the phrase "otherwise unlawful" refers to the protection given speech by section 4071(a), which expressly prohibits schools from denying student religious groups equal access. Allowing schools to prohibit meetings that are otherwise unlawful, therefore, most logically means that schools may prohibit religious meetings that are unlawful for reasons other than the content of the

speech that occurs at those meetings. To interpret the Act otherwise would allow States to avoid the Act's requirements by the simple expedient of declaring student religious meetings on school property illegal. Congress could not have

intended this when it passed the Act.

However, no other circuit has addressed this issue. The argument continues to be pressed, and it is still conceivable that a court might interpret the Act to allow States or localities to nullify the Act simply by making religious meetings on school property illegal. Congress should amend the Act or the Department of Education should issue regulations to make clear that the Ninth Circuit correctly interpreted the Act in *Garnett*.

A second example in which the Act's silence has encouraged attempts to skirt the Act's equal access requirement is the application of anti-discrimination provisions to religious groups. Many schools that recognize extracurricular student groups provide that the groups must not discriminate in their membership based on race, sex, religion, or other characteristics. I agree that student religious groups should not be allowed to discriminate on the basis of, say, race, any more than the school chess club. But some schools have used these anti-discrimination provisions to deny recognition of certain religious clubs

The Act's omissions and ambiguities encouraged attempts to skirt the Act's requirements.

whose constitutions provide that their leadership must hold a particular religious belief, since that requirement discriminates on the basis of religion.

For example, in *Hsu v. Roslyn Union Free School District* No.3, 85 F.3d 839 (2d Cir. 1996), a New York school district allowed students to form a Christian club, devoted primarily to worship, Bible study, and Christian fellowship, only if the students agreed to allow non-Christians to be eligible to be officers. The students refused to accept this condition. The Second Circuit in *Hsu* held that the club could require that some of its officers, whom the court viewed as having duties necessarily related to the club's religious mission, to be Christians. However, the school district could prohibit the club from requiring that other officers, whom the court believed did not have duties that were necessarily religious (for instance, a secretary whose primary duty was to accurately record the minutes of meetings), to be Christians.

This portion of the *Hsu* case has the potential to thwart the Act's purpose. To deny a religious group the right to require its leaders to share the group's religious purpose is to require that group to allow students who are not committed to the religious group's purpose to be elected to leadership positions. As the *Hsu* court itself recognized, to many religious believers, *all* acts (including something as seemingly mundane as recording a meeting's minutes) are suffused with religious significance; one's whole life is at God's service, not just some "religious component" of that life. Leaders, by the virtue of their position, provide example to members; thus, it makes sense that a Christian club, for example, would want (indeed require) its leaders to provide an explicit example of Christian living. Moreover, an organization's effectiveness often depends on the leaders' effectiveness, and the leaders' effectiveness often depends on the leaders' devotion to the organization and the causes and values it repre-

sents. Leaders who do not share the club's religious vision and values are less likely to be effective leaders, and could very well undermine the club's mission.

This aspect of the *Hsu* case thus could undermine the Equal Access Act by deterring formation of religious clubs. Some students may well forego creating a religious club rather than form a club which could be rendered useless through the election of leaders who hold views antithetical to the club's purpose. As Judge Van Graafeiland stated in his separate opinion in *Hsu*, "Club members are better qualified than [judges or school administrators] to determine the duties and necessary qualities of their leaders." Again, either Congress or the Department of Education should make clear that student religious clubs

need not make leadership positions open to students whose own views might be at odds with the purpose for which the club was formed.

The Equal Access Act has been a real help in

ensuring that student religious speech and association rights are not treated as second-class rights. Clarifying that State constitutional provisions do not trump students' rights to equal access for religious speech and that a religious group is free to reserve leadership positions to those who share the group's religious convictions would make the Act even more effective.

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State constitutional provisions do not trump students' rights to equal access.

The Politics of Exclusion

By James Zogby

Most Americans probably remember the ABSCAM scandal of 1980 as a sting operation that netted five corrupt congressmen and one senator on charges of bribery and influence peddling. But to many Arab Americans, ABSCAM had an entirely different meaning. We were already acutely sensitive to the stereotypes of Arabs held by many Americans. The FBI surveillance footage—showing an agent dressed as an Arab Sheik corrupting American politicians—fed into the worst of these images. That the FBI would use and thereby propagate such stereotypes left us feeling vulnerable and angry. Unfortunately, the operation also exposed how little real political power we had, and made it even harder for us to gain access to the political process.

Like many racial and ethnic groups in America, Arab Americans have had to struggle for their political and civil rights over the last quarter century. It was not our right to vote that was challenged. Rather, it was broader, more active forms of political participation that were often denied to us. Our political organizing effort usually met with suspicion, resistance, or outright rejection—even in the most progressive company.

I remember how, in 1978, a small group of concerned Arab Americans I was a member of attempted to join a Washington-based coalition calling

for a new, more pacific foreign policy. Although we shared the coalition's agenda, our application for membership was denied. That same year, our group was invited to the White House to participate in an ethnic leadership meeting. Three days after the meeting, a White House official

mayor of "all Philadelphians." As fundraisers go, especially by today's standards, it was not overly successful. It only raised about \$4,200. But those who were there that night vowed their enthusiastic support. They had been included.

The next day, the Republican can-

**My brother
called me from Philadelphia.
"You won't believe what's happening
here," he said.**

called to inform me that we would not be re-invited because the presence of Arab Americans who happened to be "pro-Palestinian" had proven too controversial.

We were caught in a Catch-22. Stereotypes wounded us morally and politically, and left us vulnerable to exclusion and defamation. But our weakness hobbled us from responding adequately to the stereotypes. One instance brought this dilemma vividly to life.

It was 15 years ago in Philadelphia. My brother, John, had joined a small group of other Arab Americans at the home of a local Arab American leader to raise funds for the Democratic Party's mayoral candidate, Wilson Goode.

It was, he told me later, an emotional night. Goode pledged to be the

didate publicly denounced Goode for having accepted money from "Arabs." And Goode, to set the matter right, announced that he was returning all the checks.

My brother called me that night from Philadelphia to give me the news. "You won't believe what's happening here," he said.

Well, I did believe it, and in the next few years that story replayed itself in several localities. Some candidates returned contributions; others announced up front that they would not accept Arab American support. Some candidates rejected Arab American endorsements, while others denounced their opponents for accepting support from our community or involvement in their campaigns. In most instances, candidates confided fear of retribution from

their Jewish supporters—even though most Jewish leaders decried such exclusionary behavior. Time after time, we found ourselves shut out from the political process—not just at the national level, but even in local races.

Sometimes, Arab Americans found that their mere existence had become a campaign issue. A few weeks before the 1985 mayoral elections in Dearborn, Michigan, every household received a campaign mailer from one candidate announcing in thick, one-inch black lettering his solution to the “Arab problem,” xenophobic concerns about the increase of Arab immigration into the city. Dearborn happens to be the city with the highest proportion of Arab Americans in its population—over 20 percent.

The Arab American community has made strenuous efforts in recent years to educate Americans about who we are, to end the politics of exclusion, and to secure our rights. These efforts have paid off: I have the sense that anti-Arab American sentiment has generally diminished over the last decade or so. More and more Americans, I believe, have come to realize that Arab Americans are neither terrorists nor oil sheiks, but just ordinary citizens with a paycheck, a mortgage, and their children’s college tuition to worry about. Through increased voter registration and political organizing, we have fought our way back into the arena. We have established strong national organizations and gained recognition as a legit-

imate political constituency.

In Dearborn, for example, our voter strength has gone from fewer than 1,000 in 1985 to more than 7,000 today. So when that city’s mayor—the very man who campaigned against us in 1985—appears before Arab American audiences, he now speaks respectfully of his “Arab American friends.” He recently appointed an Arab American to a

the district complaining of “the foreign-sounding” names of his opponent’s Arab American contributors. The recent bombing of the embassies in Kenya and Tanzania may provoke a flare-up of anti-Arab prejudice, as the World Trade Center bombings did four years ago.

But despite pockets of bigotry, real change is occurring as well. There is no better evidence of that fact than

In Dearborn, Michigan, every household received a campaign mailer announcing one candidate’s solution to the “Arab problem.”

key position in his administration. The same change occurred in Philadelphia, where Arab Americans gave strong and early support to a candidate named Ed Rendell, who, as mayor, has appointed Arab Americans to a number of city commissions.

Serious problems remain for Arab Americans. In some instances, negative stereotypes continue to inform public policy. Airport profiling, the practice of focusing on Arab-looking individuals as potential terrorists for heightened security checks, unfairly targets us on the basis of our ethnicity. And as recently as last year, the opponent of an Arab American candidate for Congress attacked him because of his ethnicity and those of many of his supporters. The opponent sent a mailer to households of

the May 7, 1998 appearance of President Clinton before the Arab American Leadership Conference in Washington, DC.

Almost 15 years to the day after William Goode returned Arab Americans’ contributions, President Clinton became the first U.S. president to speak before an Arab American conference.

The president’s opening words were, “My fellow Americans,” and they were met with thunderous applause. It might have been an ordinary greeting in another context, but for Arab Americans it was an extraordinary moment, a watershed in our political history.

James Zogby is President of the Arab American Institute.

RACIAL MIXTURE, IDENTITY CHOICE, AND CIVIL RIGHTS

Beyond the Whiteness of Whiteness: Memoir of a White Mother of Black Sons

By Jane Lazarre (Duke University Press, 1996. xxi-140 pp. \$17.95.)

The Color of Water: A Black Man's Tribute to His White Mother

By James McBride (Riverhead Books, 1996. xiii-228 pp. \$22.95.)

Black, White, Other: Biracial Americans Talk About Race and Identity

By Lise Funderburg (William Morrow & Co., 1994. 391 pp. Paperback \$15.)

A Review Essay by Kevin R. Johnson

These fine books provide a multitude of perspectives on the lives of persons of Black/white ancestry in the United States. Besides offering gripping tales of the difficulties encountered by mixed race people in a society stratified along Black/white lines, they offer important insights into the complexities of race. Although many, perhaps most, in this country view race relations through Black/white lenses, the realities of modern social life, as exemplified by the stories told in these books, are infinitely more complex.

Jane Lazarre's *Beyond the Whiteness of Whiteness* tells of the racial enlightenment of a Jewish woman who married an African American man. In this well-written memoir, Lazarre describes the anguish of a white parent watching how cruel a racist world

The realities of race are more complex than Black/white

can be to her own flesh and blood. She sees how the police treat her son as a young Black man, and therefore a suspected criminal, and listens while a speaker at his graduation from the Afro-American Studies department at Brown University proclaims that "you must always be better than white people, you must be exceptional in order to succeed in this society." Lazarre slowly comes to the realization that her Black sons will have a dramatically different set of life experiences than her own. She also soberly explains how she felt the odd one out of the family when her oldest son proudly embraced a Black, and rejected a white, identity.

Raising Black sons transformed Lazarre's racial sensibilities: "Being the white mother of Black children in a racist society is a strenuous process

.... One must be educated, willing to cross over into an entirely new way of seeing things." Lazarre thoughtfully analyzes her evolution from a color-blind view of civil rights nurtured by 1960s activism to her later understanding that race conscious remedies are necessary to combat the discrimination that she sees suffered by Black persons she loves. She emphasizes that most whites fail to understand the prevalence of racism in the modern United States: "whiteness ... is being oblivious, out of ignorance or callousness or bigotry or fear, to the history and legacy of American slavery, to the generations of racial oppression continuing; to the repeated indignities experienced by Black Americans every single day ...; to the highly racialized society that this country remains."

One unexplored aspect of *Beyond the Whiteness of Whiteness* concerns how interracial relationships come to be. Lazarre suggests more than once that simple fate resulted in her marriage to an African American man. One is left to wonder how an individual's choice of a spouse — particularly one of a different race — in fact is influenced by society, race, politics, and personal sensibilities, as well as by mere chance and the amorphous emotion known as love. Interracial relationships in the United States historically have been viewed as political

statements, whether it be slaveholders' exerting horribly abusive power over Black women or Eldridge Cleaver's controversial views about the dominance of white women through violence. Many informed observers agree that racial identity entails at least some personal choice. One wonders how one of the most important choices in many of our lives could be made independent of the identity formation process.

James McBride's *The Color of Water* is an eloquent tribute to his exceptional mother, Ruth McBride Jordan, who raised twelve amazing Black children in a Brooklyn housing project. They grew up to be successful professionals, including a writer, doctor, psychologist, and the chair of the Afro-American history department at Pennsylvania State University.

Ruth McBride, the daughter of an Orthodox Jewish rabbi in Suffolk, Virginia, grew up with an abusive father who disowned her when she married an African American man who later became a minister. Her son James grew up in a Black neighborhood with his white mother who denied her whiteness and taught her children to ignore their race. His racial consciousness developed nonetheless as he experienced how Blacks live in this country. As a child in an all-Black neighborhood, he feels embarrassed by his white mother, whom he always loved dearly. James later feared for his mother's safety during the Black Power movement of the 1960s.

In writing the book, James

McBride discovered his mixed ancestry, including his Jewish roots in Virginia. He described the difficulties of acknowledging his whiteness given his "Black" physical appearance. As McBride notes, "being mixed is like a tingling feeling that you have in your nose just before you sneeze — you're waiting for it to happen but it never does. Given my black face and upbringing it was easy for me to flee into the anonymity of blackness, yet I felt frustrated to live in a world that considers the color of your face an immediate political statement,

**“I felt frustrated
to live in a world that considers the
color of your face an immediate
political statement.”**

whether you like it or not.”

The Color of Water also suggests that the choice of a spouse is not simply a decision of the heart. McBride's rebellious mother married a Black man, one of the ultimate signs of racial rebellion before the Civil Rights revolution. His own wife, like him, is half Black, half Jewish. Both choices may be mere coincidence, but one wonders how that could be.

In writing *Black, White, Other*, Lise Funderburg interviewed 65 people of mixed Black, white heritage (like herself) to explore “. . .the diverse ways that people experience a seemingly uniform heritage.” The interviewees run the gamut of physical appearances, from light to dark skinned, from straight to kinky hair, from

“white” facial features to “Black” ones. Funderburg brings these physical differences to life by including a small picture of each person. Besides recounting the more common experiences of mixed Black/white persons, Funderburg tells of the lives of the son of an African American serviceman and an Icelandic woman, the child of Irish and Nigerian immigrants, and the daughter of a Kenyan father and white woman, to name a few of the less common combinations described in the book.

The diversity of physical appearances is nothing compared to the

variation in the individual responses to mixed ancestry. Some embraced a Black identity. A few others attempted to

occasionally “pass” as White or tried to simply ignore race. Still others embraced a biracial identity highlighting the heritages of both parents.

Melancholy yet captivating tales of uncertainty and feelings of rejection permeate the individual reminiscences. Many persons reveal moving stories about how families rejected the interracial marriages of their parents and their very existence. Some knew little about half of their family (often the white half) because that family had disappeared from their parents' lives.

The rich complexities facing mixed race persons are revealed in the contrasting reactions to them by different communities. Whites treated some as “too Black” while some Blacks thought them “too light.” At

the same time, some whites liked their “exotic” looks while some Blacks admired their fairer complexions. Most, if not all, had first-hand experience with the “N” word and other racial epithets. Often, the racism experienced was less explicit, though almost as painful. For example, one junior employee wore a bow tie to the office only to be met with a “Good morning, Mr. Farrakhan” by a senior member of the investment firm. A few stories serve as chilling reminders of the depth of racial hatred in the United States, such as that of the white mother who rejected her Black son and tried to kill him with rat poisoning.

The complexities of romance for mixed-race persons and their parents demonstrate that the old adage that “love conquers all” is far from true. Divorce among the parents was common. The added stresses caused by an interracial relationship and raising mixed race children almost certainly played a role. In addition, many candidly admitted that race influenced the choice of a loved one, and that they felt more comfortable with Blacks or other mixed-race persons. One gay man considered his preference for white men: “I don’t think sexual preference is a political thing. Well, it can be ..., how can one ever absolutely say that on some unconscious level it isn’t?” One interviewee worried aloud about how she viewed interracial relationships: “I always look at interracial couples... and say, ‘When there’s a black man and a white woman, is the white woman

less attractive?’ This is terrible, but I think about status.” Such thoughts, though they run through peoples’ minds, rarely enter our public discussion of race because of the volatile, potentially incendiary issues raised.

Gender-specific experiences recurred in the experiences of the mixed race persons interviewed by Funderburg. Many mixed Black women never felt that any white men had any romantic interest in them. A number of light-skinned African American women expressed that they felt less than accepted by other Black women. Some thought that some Black men liked them simply because their whiteness made them a “trophy.”

Each of these books reflects the importance of physical appearance in how society responds to mixed-race people.

Much academic literature has focused on how society, not biology, constructs races, and on the role of the individual in adopting an identity. Many of the mixed Black/white persons interviewed by Funderburg, even the “whiter” ones, however, suggested that they had little choice but to identify as Black. One remarked: “Who I am inside has been there since I have memory. I suppose that there’s choice where I would clearly be choosing to pretend to be something else. But that really isn’t choice from my perspective.” Other stories reveal the possibility for choice within limits. One woman’s older sister told her as a child that her white father, whom she had never met, was Puerto Rican. Embracing her

Latina/o “roots,” she learned Spanish and, as a teen, proudly wore a Puerto Rican flag on her jeans. Later, she learned that her father in fact was white, a shocking revelation that left her identity in shambles.

Each of these books reflects the importance of physical appearance in how society responds to mixed-race people. The darker the skin, the more arduous the individual journey and the more common the treatment by whites as African American. At the same time, the fairer persons experienced different identity problems, such as uncertainty about where they belonged. They felt scrutinized by some African Americans because of

their white physical appearance, and by whites who treated them as Black because of their “Black look.” They were not quite white, but not really

Black either.

Generational differences in the experiences of mixed-race persons are readily apparent. While white men often had children with African American women in the days of slavery, today the relationships often are between Black men and white women, as illustrated by the autobiographies of Lazzarre and McBride. This sea change has resulted in different responses by mixed-race persons to issues of racial identity. While mixed-race persons of generations past often attempted to hide the fact that they had a white parent, the common modern response is to acknowledge their mixed heritage, as seen in Funderburg’s anthology.

Racial identity also combines with

class and gender to influence individual identity and status in the United States. The intersection of race, class, and gender greatly influences life experiences. In evaluating the impact on one's life, it is impossible to isolate or quantify the influence of these factors.

In the end, we must ask what this all means for those interested in improving the status of racial minorities. Lazarre's book, in effect, tells whites that they must acknowledge white privilege and the modern impact of racism on this Nation, rather than view it as a historical artifact. McBride apparently advocates rugged self-determination as a means of defeating racism and poverty. Funderburg's anthology of stories suggests that society needs to better understand the complexities of racial mixture, racial classification, and the very concept of "race" itself. Readers no doubt will have their own views about the efficacy of these prescriptions.

The books, which focus on the experiences of persons of mixed African American/white descent, highlight some of the complexities of race relations in the United States. Black/white persons, however, represent just the tip of the iceberg when it comes to racial mixture. In a multicultural, multiracial United States, race relations isn't just Black and white. Asian Americans and whites,

Latina/os and whites, and Native Americans and whites, all have higher rates of intermarriage than African Americans and whites. Intermarriage between minority groups also occurs and is increasing. The physical appearances of the products of these interracial relationships differ from the variations found among mixed Black/white persons. Not surprisingly, the experiences of persons in these groups differs from those analyzed in the trio of books.

For Latinas and Latinos, racial mixture long has been a simple fact of life. Mexico, for example, celebrates *mestizaje*, the mixture of Spanish and the indigenous peoples. Mexican philoso-

rates vary regionally in the United States, with intermarriage much less common along the racially-stratified border between the U.S. and Mexico than in the interior of the country. Because of these and other differences between the constituent races, one could expect the mixed Mexican/Anglo person to have a different set of life experiences than Black/white people.

One can only wonder what the future will bring with increasing rates of racial mixture in the United States. The political fracas over the multi-racial category considered by the Bureau of the Census suggests that the rise of mixed-race people will not instantly result in racial harmony. The

In a multicultural, multiracial United States, race relations isn't just Black and white.

pher Jose Vasconcelos even talked of a *raza cósmica* (cosmic race) created by the combination. Due in part to intermarriage, Mexican-Americans in the United States are incredibly diverse, physically and otherwise. As former United States Ambassador to the United Nations and Secretary of Energy designate Bill Richardson demonstrates, intermarriage makes it impossible to judge whether a person is Latina/o by surname alone.

This all does not mean that marriages between Anglos and Latina/os never face resistance. Intermarriage

legal impact of mixed race persons also raises vexing questions. How, for example, should affirmative action treat persons of mixed white/Black (or mixed Latina/o, Asian American, or Native American) background? As white? Black? Something else? Should the anti-discrimination laws protect mixed-race people? Such difficult questions will need to be addressed in the 21st century. Put simply, the untidiness of race is unlikely to go away, with or without mixed-race persons.

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RACIAL THEORIES AND REALITIES

Getting Beyond Race: The Changing American Culture

By Richard J. Payne (Westview Press, 1998. 288 pp. \$25.)

Reviewed by John Sibley Butler

Richard Payne's *Getting Beyond Race* is a work which takes the concept of race from theory to everyday life. The book focuses considerable attention on success in the United States and how racial success brings people together within an overall positive value system. The book gravitates between biological issues of race and opportunity structure in America. This gives it an interesting dynamic, since black achievement has always taken place in the face of extreme white racist ideas about race.

Payne grounds his analysis in the sociological idea that race has been socially constructed by individuals and the "scientific" community. He argues that, "a new generation of Americans with higher levels of education, more contact with people from diverse backgrounds, and constant exposure to ideas that contradict the essential premises of racism increasingly find the concept of race unacceptable.... Even though race continues to matter, it is systematically being eroded by deliberate efforts to get beyond it and by far-reaching social, technological, and demograph-

ic changes in American society." When this reality is combined with the idea that the scientific community is challenging race as a concept, the prognosis of getting beyond race becomes a genuine possibility.

Payne reviews early theories of race that were developed by European thinkers to account for differences between Teutonic (Germanic and Nordic), Alpine

Jews, Italians, and Irish have all faced the biological inferiority stigma on this side of the Atlantic.

The conclusions reached in the recent book *The Bell Curve* pale in comparison with those of early writers on the biological inferiority of Southern Europeans. For example, in 1917 Henry Goddard, studying immigrants on Ellis Island, attempted to quantify the notion that Northern

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(Celtic), and Mediterranean groups (Iberian and Latin). Northern Europeans were viewed as being biologically superior to Southern Europeans, an idea that was transplanted to the Americas with European colonialism and the slave trade. Coupled with the reality that the English did not have a history of interacting with people of color, the idea of the innate superiority of the Anglo-Saxon branch of the Caucasian race had become a part of the developing American culture by the 1800s. Although the concept of "whiteness" was developed for people of European descent, the struggle to "become white" is also an interesting American story. Eastern European

Europeans were superior to Southern Europeans. His findings, hailed as the scientific standard of his day, were that 83 percent of all Jews were feeble-minded and 79 percent of all Italians were morons. Thus, the concept of race was an invention that has a long "scholarly" history. Only a small portion of that history is related to people of African descent.

Having shown that the concept of race is socially and scientifically constructed, Payne turns to the idea that culture, or the sum total of everything created by people that is shared, can actually challenge the concept of race. He argues that the tendency to focus on blacks and whites ignores the increasing numbers of Americans of

Latin American and Asian heritage and the greater number of multiracial Americans that are seeking to change rigid racial classifications.

During the days of legal segregation, Native Americans, Mexican Americans, and Asian Americans never drank from the "Colored Only" water fountain or went to a "Colored Only" rest facility. These groups, albeit with considerable strain, operated within the framework of white America.

The author notes that the idea of a multiracial society is already here, and can be seen in what we call the African-American population of today. Indeed, one of the distinguishing characteristics of black America is its rich mixture, ranging from European white to African Black. If one developed a racially mixed category, it would without a doubt be the largest.

Payne points out that demographic change will not only alter the nature of race relations but race itself, basing this on current projections that the U.S. will be mostly non-white in the not too distant future. This is happening not only because of differences in fertility rates among white and non-white groups here, but also because increasing numbers of racial and ethnic intermarriages are taking place that produce multiracial and multi-ethnic children.

It is also interesting that whites rarely talk about people in their family tree being of African descent, although we know that there has been a lot of racial mixing in America. The idea of "passing" racially is to deny a racial category. In contrast, the children of blacks and other groups, as has been true for generations, are placed in the black racial category. This is even done when their phenotype is not in the African tradition.

Which brings us back to the old sociological paradigm of social distance, where the measurement was on the extent to which a group would "pollute" the racial pool of Anglo America. Southern and Eastern Europeans were once considered racial pollutants but gradually became "white."

The best part of this work has to do with opportunities for blacks in the US. The section on the military is excellent, as well as the section on promoting equal opportunity and treatment.

This is an excellent book on a subject of pervasive importance. Ironically, in analyzing why and how to get beyond race, Richard Payne also reminds us of how indelibly the idea of race is scratched on our minds.

Dr. John Sibley Butler is a professor in the department of sociology at the University of Texas/Austin. He is co-author of the critically acclaimed Be All That We Can Be, an analysis of affirmative action in the military.

BUILDING SOUTHERN RACIAL IDENTITIES

Making Whiteness: The Culture of Segregation in the South, 1890-1940

By Grace Elizabeth Hale (Pantheon, 1998. 427 pp. \$30.)

Reviewed by David Roediger

Making Whiteness announces the arrival of a major new writer on the history of race in the South and the Nation. The accent here must fall on both writer and history, as Grace Elizabeth Hale styles telling accounts of the past in uncommonly crisp and adventure-some prose. Emancipation of slaves, we learn, "made anything possible and nothing certain." The pristine

pre-industrial past over which twentieth century Southern Agrarian critics waxed nostalgic was, Hale shows, already departed. "Their Adam and Eve," she writes of the Agrarians, "had already been tempted."

I begin with questions of style because one key to the impressive success of *Making Whiteness* lies in its dramatic flair — its scenic accounts of travel and terror, its startling juxtapositions of Southern country stores and lynchings, its keen eye for detail and its sweeping interest in change over time. These are analytical virtues as well as stylistic ones as Hale insists on showing that post-Civil War Southern whiteness and white supremacy represented a sudden arrival, modern in its very

"Emancipation of slaves made anything possible and nothing certain."

barbarity, requiring not only creation but constant re-creation against a host of contrary pressures, by far the greatest of which were African American initiatives in asserting humanity and mounting resistance. W.E.B. DuBois' brilliant indictment of racist historians of the post-Civil War period focused on their inability to capture the "drama" of those years. Hale succeeds precisely in this regard. Her capturing of postbellum dramas which redefined race works to demystify white supremacy.

Echoing C. Vann Woodward's *The Strange Career of Jim Crow*, Hale regards other outcomes than a stark black/white dichotomy as logical, if not possible, ones coming out of emancipation. The racial segregation on the railway cars, which Hale so eloquently describes, might have fol-

lowed class lines, admitting wealthier African Americans to integrated facilities but relying on “inflections” between race and class to, Northern-style, keep the races largely apart. The choice to build a segregated order committed the white South to incredibly hard work of categorizing, policing and pretending. It was a dramatic choice.

It was likewise a thoroughly modern choice. From the new forms of transportation, to print culture, to advertising, to processed food, what Anne McClintock has called “commodity racism” was part and parcel of Southern whiteness. Since the

Making Whiteness regards the formation of Southern racial identity as a result of activities occurring mainly in households and via consumption, not on the job. In this, its apt attention to gender and youth, and in its emphasis on the South, Hale’s book provides a strong counterweight to accounts which root white identity in work experiences in the North. Significant attention is paid, moreover, to the work done by African American domestic servants and to the ways that work was represented.

Equally at home with social history and literary criticism, with “Stone Mountain” monuments to white-

RAISING THE ROOF ON RACE

The House That Race Built: Original Essays by Toni Morrison, Angela Y. Davis, Cornel West, and Others on Black Americans and Politics in America Today

Edited by Wahneema Lubiano (Vintage Books, 1998. 323 pp. Paperback, \$14.)

Reviewed by Lisa A. Crooms

According to Toni Morrison, freedom in the United States requires figuring out “how to convert a racist house into a race-specific yet nonracist home.” The feasibility of this overhaul is central to the 15 essays collected in this volume. The authors, each in his or her own manner, consider whether race matters and, if so, how. Together they demonstrate what editor Wahneema Lubiano calls “the lethal inadequacy of the terms of debate now at the center of American political discourse.” The sites on which they do so include the racist house of white supremacy, the race-specific but oppressive house/home of racial authenticity, and a “race-specific yet non-racist home.”

Within the racist house of white supremacy, race matters in a palpable way. Racial identity marks the boundaries where “raced and erased” lives are lived. People of color, particularly black Americans, are constructed as the collectively marginalized “Other” to normative whiteness. This is the “othering” captured by some of the essays, in contexts as varied as the politics of paid domestic work, the economics of the prison-industrial-complex, and the law of color blindness.

White Southern terror stitched up the fissures in the segregationist project.

impersonal forces of the mass market, whether expressed in mail order catalogs or even in rural stores, threatened to liquidate racial lines amidst a generalized will to consume, the racism of product labeling was not just emblematic, but also constitutive of white supremacy.

Country stores often served also as the place which displayed artifacts of racial terror, the fingers of the lynched and the books describing their deaths. More than any other modern historian of lynching — and here her strong attention to the works of African American thinkers of the early twentieth century matters greatly — Hale demonstrates that white Southern terror, its promotion in festive and well-documented lynchings, its witness and its memorialization stitched up the fissures in the segregationist project. Terror made whiteness just as surely as white supremacy generated terror.

ness and with broken lives, Hale’s work subtly explores both sides of the Jim Crow color line in order to tell where whiteness came from and headed. In her final lines she offers a vital question and a lucid answer: “Would America be American without its white people? No. It would be something better, the fulfillment of what we postpone by calling a dream.”

David Roediger chairs the American Studies Program at the University of Minnesota. His edited volume Black on White: Black Writers on What It Means to Be White recently appeared

These authors speak of the common difficulty of negotiating identities constructed in a house, the bricks of which are cemented by the mortar of white supremacy. They examine not only the impact of white supremacy on people of color, but also the effect of white racial nationalism on working class and poor whites, as well as the purposes served by the rhetoric of white racial disadvantage. They illustrate the need to change the terms of the current public discourse about race to reflect the complexities of the lives lived by all who reside within this racist house.

Race also matters in the race-spe-

based. Others question the efficacy of not challenging the soundness of race, as constructed, and the malleability of racial identity. All require the reader to consider the ways that racial authenticity protects its house/home from intruders who neither can nor do belong inside.

Within a "race-specific yet non-racist home," race both matters and does not. As described by Morrison, the challenge of building this home is discovering how to "sign race while designing racelessness." Morrison and the other authors who imagine this home also consider how and why this home must be built. Home must

"attempts to hold the culture intellectually attentive to — even accountable for — the racism by which it functions against a tide of increasingly popular denial." The major detraction is the disappointing contribution offered by West. Rather than explore "the trajectory of [his] own thinking," West devotes a section of his all too brief afterword to a defense of the "philosophic notion of 'nihilism.'" Failing to provide more self-reflection about his thinking in "Race Matters" calls into question the centrality of that work to this part of Lubiano's project. Nevertheless, the analyses offered in the essays in *The House That Race Built* should prove to be invaluable contributions as we progress from house to home.

Lisa A. Crooms is an associate professor at Howard University's School of Law.

The authors speak of the difficulty of negotiating identities constructed in a house, the bricks of which are cemented by the mortar of white supremacy.

cific but oppressive house/home of racial authenticity. Like the house of white supremacy, the house/home of racial authenticity constructs race based on contested community membership. Here, however, othering is the result of a racial authenticity in which sex, sexuality, and class are used to marginalize human beings. Whether the contested ground is the public space of playgrounds, the sacred space of religious music, or the literary space of James Baldwin and Amiri Baraka, these essays explore the limitations of failing to move beyond what Kendall Thomas calls, "the jargon of black authenticity" to embrace the realities of black lives as lived. Some of the authors squarely confront the patriarchal and homophobic visions on which some black nationalism is

be "social space that is psychically and physically safe." Home can only be based on what Howard Winant describes as "a political and moral vision in which the individual and the group...see themselves as included, supported, and contributing to the construction of a better society." We will realize that we must build a home only when the house of white supremacy is condemned. We will yearn for home only when we admit that the house/home of racial authenticity is too cramped to hold the multiplicity of our racial existences.

This discourse of dwelling, in which houses and homes are far from synonymous, is what these essays consider. Anchored by Lubiano's introduction and an afterword by Cornel West, the volume is "an openly political collection" which

DECONSTRUCTING ASIAN AMERICAN IDENTITY

The Accidental Asian: Notes of a Native Speaker

By Eric Liu (Random House, 1998, 256 pp. \$23.)

Reviewed by Michael Omi

The national conversation on race often seems hopelessly mired by rigid bipolar perspectives and thinking. How we think about, engage, and politically mobilize around race in the United States has been traditionally shaped by a black/white paradigm of race relations. Difficult racial issues, such as affirmative action, are framed as a stark choice between racial preferences and "colorblindness." In *The Accidental Asian: Notes of a Native Speaker*, Eric Liu offers a more expansive and compelling understanding of

race in the United States by situating and interrogating how Asian Americans are popularly portrayed, and how they see themselves.

Liu, an essayist, commentator for MSNBC, and a former speechwriter for President Clinton, presents a highly personal narrative as an “accidental Asian”: “Someone who has stumbled onto a sense of race; who wonders now what to do with it.” Liu’s essays – about his deceased father, his grandmother’s Chinatown, the Asian political campaign donors controversy, Asian Americans as the “new Jews”— manage to intriguingly raise broader issues of diasporic consciousness, racial/cultural hybridity,

“myth and legend,” and ends up concluding that all identities are social constructions and any sense of peoplehood is fraught with contradictions and cleavages. Asian Americans are an incredibly diverse lot — differing by ethnicity, generation, class, and gender — and Liu is suspicious of the category as the basis for identity, cultural belonging, and shared political interest. “It would take,” he says, “an act of selective deafness to hear, in this cacophony, a unitary voice.”

While Liu considers himself an “identity libertarian” who fears “ethnosclerosis,” he does have his Warhol moment as an Asian American. In the course of heated

debate for political incorporation. But the self-defined Asian Americanists I’m familiar with are more in tune with, and consumed by, the very issues Liu articulates – the socially constructed nature of race, the dilemmas of diasporic consciousness, and the impact of increasing hybridity. His approach tends to flatten identity positions and their creative engagement with existing political/cultural theory.

While Liu distances himself from the Scylla of identity politics, he also steers clear of the Charybdis of neo-conservative perspectives on race. He urges, with respect to affirmative action, that we “call the color-blind absolutists on the disingenuous of their vision,” and notes that the opportunities he has enjoyed “neither disprove the existence of racism nor inoculates me from its effects.”

This is thoughtful positioning. Drawing on his personal trials, Liu notes the ambiguities of his own racial location and in so doing reveals how race is becoming more complex. This is all part of an unfolding process by which the master narratives of race are being challenged, rethought, and radically revised.

Dr. Michael Omi is a professor of comparative ethnic studies at the University of California/Berkeley. He is author of Racial Formations, an influential “critical” race theory work.

Identities are social constructions, and any sense of peoplehood is fraught with contradictions and cleavages.

and “whiteness.”

Growing up in a professional household in a predominantly white community, Liu has had an ambivalent relationship to his “Chineseness.” While he remembers no overt racist acts directed at him, his youth is spent struggling with his unruly Asian hair and being frustrated in his attempts to romance white girls. His response was to defy “the stereotype of the Asian American male as a nerdy, one-dimensional weakling,” fashioning himself into a “Renaissance boy,” and distancing himself from other Asian Americans at Yale University. He comes to realize, however, that “to act self-consciously against Asian ‘tendencies’ is not to break loose from the cage of myth and legend; it is to turn the very key that locks you inside.”

Liu deconstructs Asian American

televised debate with a staff writer from the *National Review* over a controversial cover depicting the Clintons and Al Gore in yellowface, Liu becomes outraged at the normalization of anti-Asian images and momentarily assumes the stance of a righteous Asian American advocate. “That’s how it is with Asian American identity,” he reflects, “nothing brings it out like other people’s expectations and a sense of danger.”

The trouble with such an identity, according to Liu, is that it is reactive, a form of self-defense, and fundamentally unstable. His rejection of identity politics seems to rest, however, on a shallow caricature of Asian American activists. They are presented as ideologues suffering from an “enclave mentality” who espouse a “racial nationalism” as the only vehi-

THE VITAL CENTER HOLDS

One Nation, After All

By Alan Wolfe (Viking Press, 1998. 384 pp. \$24.95.)

Reviewed by Edward G. Carmines

One *Nation, After All* is an important contribution to the culture wars debate currently taking place in the United States. But the reason for its importance is not because it is typical of most writings on this topic.

This literature, from the left as well as from the right, tends to be morally judgmental, ideologically combative, and politically uncompromising. As Professor Wolfe observes, both conservatives and liberals see Americans as being polarized between moral traditionalists who “retain strong religious beliefs, adhere to the traditional family, possess unquestioning loyalty to their country, dislike immigration, denounce pornography, and are suspicious of cultural relativism and moral libertarians or modernists who have accepted the basic axioms of feminism, support principles of multiculturalism, express cosmopolitan values, and place a high priority on civil liberties.”

The cultural left and right disagree about a whole host of public issues including abortion, capital punishment, affirmative action, gun control, the role of women and the treatment of gays. And this disagreement is supposedly so wide-ranging, deeply rooted, and emotionally-charged that no common ground is possible—hence the designation culture “war”. In response to this widely-accepted picture of cultural combat in the United States Wolfe offers the well-worn American adage, “It ain’t necessarily so.”

Relying on 200 in-depth interviews conducted in eight middle-class communities in four regions (East, South, Midwest, and West) of the U.S., Wolfe tests the proposition that divisive cultural conflict dominates middle America. His main conclusion is that this is not so—no cultural schism polarizes middle-class Americans, certainly not to the extent that would be justified by the use of the term cultural war.

What Wolfe finds instead is that middle-class Americans tend to have ambivalent, moderate cultural beliefs that are unlikely to please ideologies of either the left or right. On issue after issue he finds that people split

comes to the family and the role of women, middle-class Americans discover a middle position that is an awkward combination of left and right but undoubtedly satisfies neither. They believe that many different family forms are viable and deserve respect and that it is inappropriate and indeed unjust to deny women the opportunity to work outside the home if they choose to do so. But they also believe that the family is the bedrock of society and that when mothers work they are responding to practical necessities, not making a statement about feminist principles. They also felt that mothers who stay at home deserve

Both conservatives and liberals see Americans as being polarized between moral traditionalists and modernists.

the difference between the cultural extremes. They tend to carve out a centrist position even though cultural elites with much more extreme views dominate the debate. For example, Wolfe characterizes middle-class Americans as religious individualists in summarizing how they feel about the role of religion in public life. On the one hand, Americans tend to be religious, especially compared to citizens in other prosperous liberal democracies, and repeatedly emphasize the need for moral beliefs to guide public as well as private behavior. But Wolfe’s respondents have an expansive, not a narrow doctrinal, view of ethics.

They are leery of imposing their moral beliefs on others and shy away from too public a display of religious commitment. Similarly, when it

equal respect.

Are these attitudes liberal or conservative? Actually, they are a bit of both but neither entirely. Middle-class Americans, Wolfe seems to be telling us, instinctively follow a compass that points them toward the center of most cultural controversies.

As I hope I have made clear there is much to admire in this work, not the least of which is that it is beautifully written and passionately presented. We come to agonize about the future of civic life in America partly because Wolfe so obviously cares himself.

No work of this scope and ambition, however, can be without problems and limitations; two of these I want to call attention to here. The first focuses on the methodology

employed in *One Nation, After All*. Wolfe is at pains to assure us that he realizes his 200 respondents do not constitute a representative sample of Americans, even of middle-class suburban Americans. But then he goes on to say, "I am confident that I will be reporting a sense of what is on the minds of enough middle-class Americans to make it worthwhile to take their views into account." But of course he and we are only interested in these respondents because they offer us a lens through which to observe and evaluate the nature of cultural divisions in contemporary American society. If these turn out to be atypical respondents, how are we to tell whether there is a real cultural war occurring in middle America that seems only a skirmish to these fortunate few?

A second concern involves the interpretation we give these results, assuming they are indeed reliable. Does the fact that middle-class Americans seem to have more moderate, centrist cultural views mean that the cultural war is a myth foisted upon American politics by unrepresentative cultural elites? Not necessarily. For it may very well be the case that political activists are divided about cultural matters just as a cultural war would imply. If Democratic and Republican activists — those who invest the most into shaping the structure of American politics—are indeed divided into warring camps when it comes to the cultural agenda, then this is just as important a piece of social reality as Wolfe's more contented middle-class respondents. Indeed, the former may be the more politically consequential reality, given the greater political resources and broader political impact of party activists. In short, despite the

reassuring tone of Wolfe's middle Americans, it would be prudent not to underestimate the level of cultural conflict now occurring in American politics.

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POTENT YEARS OF CIVIL RIGHTS STRIFE

Pillar of Fire: America in the King Years: 1963-65

By Taylor Branch (Simon & Schuster, 1998. 746 pp. \$30.)

Reviewed by Chester Hartman

This is the second volume of Taylor Branch's America in the King Years trilogy. *Parting the Waters: 1954-63* won a Pulitzer Prize in 1989; the final volume, *At Canaan's Edge*, will cover 1966 to King's assassination in 1968.

Labeling these periods of our nation's history "the King years" might seem presumptuous and hyperbolic, until we recall that the social and political turmoil of the 60s that solidified massive support for civil rights at home and an end to the Vietnam War were profoundly related to movements in which that extraordinary historical figure played so central a role.

There will be two classes of readers for this work: those like myself who lived through and were active in these events, for whom the book evokes powerful memories some three decades later, and younger readers, for whom this portrayal of a very different America will be a real eye-

opener.

What seems appropriate in briefly reviewing a volume of this length and profundity is to tick off the vast number of important issues it brought back to life:

◆The centrality of the Federal government vs. States power struggle. Civil rights activists pushed, finally with success, to get the feds to intervene in "States' rights"—making national what until then was a regional and State issue. News photos and TV coverage of Bull Connor's dogs and high-pressure firehoses "knocking children along the pavement like tumbleweed" brought the nation into the struggle. Outrageous crimes like the murder of NAACP Field Secretary Medgar Evers "changed the language of race in American mass culture overnight. The killing was called an assassination rather than a lynching."

◆The openness with which Southerners acted out their racism: Mississippi Governor Ross Barnett "strolling into the courtroom to shake [Byron de la] Beckwith's [Medgar Evers' assassin] hand during jury deliberations"; "published reports that U.S. District Judge Harold Cox referred in court to would-be Mississippi voters as 'a bunch of niggers... acting like a bunch of chimpanzees'."

◆The courage of young people ("never before was a country transformed, arguably redeemed, by the active moral witness of schoolchildren"), who braved almost unbelievable police brutality and open private terrorism.

◆The extraordinary leadership of President Lyndon Johnson, himself transformed by the Civil Rights Movement into a powerful force to gain passage of the monumental 1964 Civil Rights Act (in the face of the longest Senate filibuster in history: 534

hours).

◆The complex role of Northern whites, especially around 1964 Freedom Summer. Clergy and others admirably came down to assist in desegregation efforts and public protests. Prominent supporters like Mary Peabody, wife of Massachusetts Episcopal Bishop and mother of that State's sitting governor, elicited national attention when she was arrested in St. Augustine, Florida. Regarding Congressional support for the Civil Rights bill, Branch writes, "there was no better catalyst for church influence than the astonished personal accounts of Mississippi, delivered by respected ministers to

ter of a US senator were arrested, who would decide when to post bail—her family or the Mississippi movement?... How would the safety and comfort of the prisoners be weighed against the political value of continued confinement?"

◆The way in which the Civil Rights Movement was to trigger later movements (women, gays, environment, etc.) — a clear example being Mario Savio's return from Mississippi Summer to ignite Berkeley's Free Speech Movement.

◆The powerful, often clandestine role of the FBI, under its imperious leader J. Edgar Hoover, in undermining political protest: secretly wiretap-

Pentagon readied 19,000 troops in the suburbs, the actual event being carried out with "stunning good order"); conflicts within the Movement — SNCC's participatory, democratic movement culture vs. the command culture of King's Southern Christian Leadership Conference; the Malcolm X/M.L.King tensions; personality and other conflicts within King's staff; the interplay of War on Poverty and War on Vietnam politics with the civil rights activities; the drama of the 1964 Atlantic City Democratic Convention around the Mississippi Freedom Democratic Party; the arguments pro and con about non-violence as a philosophy and tactic; the impact of the Philadelphia, Mississippi murders of James Chaney, Andrew Goodman and Michael Schwerner.

It's all there in this dramatic, compelling, well-written, meticulously documented (97 small-type pages of source notes) treasure. Read it!

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PAIN AND GAIN IN RHETORIC OF RACE

The Ordeal of Integration

By Orlando Patterson (Civitas, 1997. 233 pp. \$ 24.50.)

Reviewed by Brian W. Jones

The twilight of the 20th Century should be an auspicious moment for public intellectuals concerned about race and its implications for the American Experiment. The faculties of elite educational institutions are densely populated by men and women whose racial sensibilities were forged in the progressive fires of the Civil Rights

“Never before was a country transformed, arguably redeemed, by the active moral witness of schoolchildren.”

congregations, colleagues and members of Congress back home in Iowa or Minnesota.” But the flip side was potent too: Some SNCC workers “considered the white volunteers more trouble than they were worth, arrogant and yet naive, so clueless about cultural subtleties that they posed a constant danger to themselves and anyone around them.” Others felt that “using whites as rescuers only reinforced the inner inferiority of Mississippi Negroes.” Branch notes there was fear that Mississippi Summer whites would “bowl over a fledgling movement by numbers and cultural connections, while those who embraced the conscience of the ‘beloved community’ shrank from the implications of using prominent white volunteers as bait for Federal intervention. If the daugh-

ping King and his associates, Malcolm X and others; using these tapes, of everything from strategy discussions to sexual liaisons, to threaten and blackmail key figures, including sending King an anonymous tape with a letter urging suicide. Hoover had incredible antipathy towards King, terming him “the most notorious liar in the country.”

◆The pernicious role that Senator Joseph McCarthy's anti-Communist witch hunt played in the FBI's attempts to discredit King and his associates, accusing him of being a Communist and forcing at least two close, important advisors who had such backgrounds to distance themselves from King.

There's much more: the 1963 March on Washington of a quarter of a million people (for which the

Movement of the 1950s and 1960s. The proliferation of media – from television and magazines to talk radio and the Internet – provides an expanded forum for a greater diversity of voices than could have been imagined at the apogee of officially sanctioned racial discrimination. That broader reach of the media has in turn helped to liberalize the racial attitudes of a vast swath of the American mainstream. And it has allowed us to identify with greater precision than ever the socioeconomic progress enjoyed by erstwhile-dispossessed communities, while underscoring the fact of poverty's stubborn persistence among the nation's largely black urban "underclass."

Nevertheless, racial discourse among the nation's elite has become shrill and vacuous. Like two alley cats fighting in the night, the competing factions among public leaders who care about race frequently savage the opposition by means intemperate, personal, and dishonest. In *The Ordeal of Integration*, a rigorous survey of the "race" debate in modern America, Harvard sociologist Orlando Patterson, sets about to correct false premises and to provide a prescription for a more constructive civic conversation.

Despite his professed conviction that "the free market is a clumsy and pernicious tool for distribution and social justice," Patterson nevertheless reserves his most devastating criticism for "Afro-American" leaders of the left (he eschews both the descriptors "black" and "African American"). In a densely footnoted essay titled "The Paradoxes of Integration," the author deconstructs the pessimistic picture of the "Sisyphean burden of blackness" so often employed by liberal public intellectuals.

He cites government statistics and academic studies showing historically

low poverty rates (the poverty rate for the black elderly has declined from 62.5 percent in the mid-sixties to 25.4 in 1995); increasing instances of interracial friendship and marriage; a burgeoning black middle class (now roughly 36 percent of all black families); increased housing satisfaction reported by Afro-Americans (74 percent of blacks today say they are satisfied with their housing, up from 45 percent 25 years ago); and a substantially closing earnings gap between the races when one controls for levels of education and, more significantly, for family composition (in 1995, for example, married black families earned a median income that was

[racial] failure." As Patterson more simply states the matter, "the pain completely dominates the gain in the current rhetoric of race." Patterson rejects the failure-exhibitionism strategy of public leadership for much the same reason that Loury does: he believes in the Booker Washingtonian ethic that civic equality fundamentally presumes the dignity of its subjects. By consistently inflating the failures of all Afro-Americans – and constructing socially deterministic excuses for individual shortcomings – in the service of remedial public policy, liberal leaders undermine progress toward meaningful civic equality.

Patterson's ire flows beyond the

Orlando Patterson sets about to correct false premises and to provide a prescription for a more constructive civic conversation

nearly 90 percent of the median for married white families.)

Conversely, single parent families are three times likelier than intact families to be poor – an alarming fact in the context of a nation in which the proportion of black families headed by a married couple declined from 70 percent in 1967 to 46 percent in 1995. This breakdown of the traditional, intact black family is, of course, consistent with larger national trends that cut across racial lines. Even so, it ultimately undermines the left's claim that the eradication of *systematic* white racism should remain the nation's principal civic priority.

Despite the apparently declining significance of race in the lives of average Americans, leaders of the left continue to engage in what Glenn Loury has defined as an "exhibitionism of

political left. He assails conservative leaders, for example, for their "contradictory" embrace of market principles and individual responsibility, and he rejects "colorblind" public policies, defending instead racial affirmative action policies for a limited phase-out period. The core of this work, however, is its demand for leaders of the left to re-examine the progress enjoyed by blacks in America. To be sure, Patterson's prose reverberates with a passion to improve the lot of the least among us.

The Ordeal of Integration reminds us that public intellectuals seeking the ends of civic equality and equal opportunity have a public responsibility to lay aside epithets and willful ignorance, and to serve the nation in the light of truth.

Brian W. Jones, *Deputy Legal Affairs*

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WHY PROP 209 SUCCEEDED The Color Bind: California's Battle to End Affirmative Action

By Lydia Chavez (University of California Press, 1998. 320 pp. \$16.95.)

Reviewed by Frank H. Wu

The affirmative action debate has overwhelmed the civil rights movement. In *The Color Bind*, Lydia Chavez explains how the Proposition 209 campaign of the 1996 California elections transformed the remedies for racial discrimination into a political wedge issue. A journalism professor at the University of California at Berkeley, the site of much of the battle, Chavez has told the story well.

The successful ballot measure serves as a case study for her contention that "the initiative process" fails to serve populist purposes, but instead "permits wealthy special interest groups to bypass the deliberative process and change laws in their narrow interest." The result is disregard for "the rights of vulnerable minorities," as well as "the long-term interests of the majority."

The affirmative action debate, however, is about both much more and much less than affirmative action itself. Chavez's book should make readers more aware of the complexities that underlie this seminal public policy issue.

Affirmative action symbolizes more than the programs themselves. Opponents of what they call "preferences" use them to represent their

sense of a declining country; loss of a common culture, and opportunities denied to white men. In response, proponents of the programs claim that African Americans still suffer significant racial discrimination that requires awareness of race. At stake are different visions of equality.

Yet the public debate over affirmative action rarely touches on these issues. Sponsors of "the California Civil Rights Initiative," recognizing that affirmative action actually attracts a consistent consensus, objected whenever their measure was described as favoring its abolishment. Their adversaries tried to make ex-Klansman David Duke the face of the

Governor Pete Wilson and Presidential candidate Bob Dole had approved of affirmative action until they endorsed Proposition 209. But the citizens of California stopped affirmative action with the strength of a constitutional amendment.

According to Chavez, the twin themes that form the "color bind" are demographic realities and political ambitions, rather than racial discrimination or civil rights.

Chavez reviews the numbers. Although whites may soon lose their majority status in the Golden State, they hold political power now and may continue to do so in the foreseeable future despite changing State demo-

"The initiative process permits wealthy special interest groups to bypass the deliberative process"

"yes" side in negative television advertising, mistakenly suggesting that prejudice was the only cause of ambivalence toward affirmative action.

While sympathetic to affirmative action, Chavez is hardly an advocate; the best characterization of her stance would be "not neutral, but fair." She calls the leaders of the anti-209 campaign "neither Bolsheviks nor saints," but pragmatic organizers anticipating a majority non-white society. Chavez laments that the anger over affirmative action has not inspired action to advance racial justice. She does not, unfortunately, offer even a sampling of the data that show blacks and whites face differing life prospects, or review disputes over how to respond to such facts.

Her goal instead is to explain how affirmative action failed in the voting booth despite its success in corporate boardrooms, on college campuses, and with Congress. Even California

graphics. At about half the population, whites nevertheless make up 88 percent of the registered electorate and 78 percent of the actual voters. Two thirds of white men voted "yes" on Proposition 209, as did half of white women. Overall, people of color voted "no."

The author also reveals the strategies that those favoring and opposing the initiative used. Like Richard Nixon, who implemented affirmative action to divide traditional liberal constituencies of labor and blacks, Governor Wilson used the "angry white male" vote to achieve a political comeback.

The Clinton administration, caught between avoiding a challenge from Jesse Jackson's Rainbow Coalition and the need for the Electoral College votes of the nation's most populous State, chose to avoid taking a strong stand on affirmative action, if possible. For instance, advisor George

Stephanopoulos “promised that the president would soon unveil a new commercial to address” affirmative action, calling it “a critical issue in a critical State.” The ad turned out to “[feature] Jim Brady talking about Clinton and gun control,” but “no one asked him to explain the logic.”

Chavez discusses aspects of the Proposition 209 campaign that deserved more attention than they were given in the daily news. She offers a behind the scenes look at efforts to write alternative initiatives, shedding light on tensions between civil rights leaders in San Francisco and Los Angeles. She also analyzes the important role that gender played in the campaign.

Chavez omits a few ironies of the fight from her account, probably for the sake of providing a larger canvas and context. Two of these immediately come to mind. One was when claims of an author of the proposal that he'd been an innocent victim of reverse discrimination proved unfounded. Another was the telling fact that, although University of California regents ended affirmative action prior to Proposition 209, the University continued to pursue special admissions for children of alumni and other “connected” applicants.

These are small quibbles. Because of its comprehensive treatment of California's Proposition 209, Chavez's book is likely to become the standard history of this important ballot initiative.

Frank H. Wu, an associate professor of law at Howard University, is co-author of Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a policy analysis of affirmative action. He is guest editor of the Books Department in this issue of the Civil Rights Journal.

BANNING SEXISM FROM MEDICINE

Walking Out on the Boys

By Frances K. Conley (Farrar Straus & Giroux, 1998. 240 pp. \$24.)

Reviewed by Catherine Myser

In 1963, the year Frances K. Conley began medical school at Stanford University, folk artist Pete Seeger exhorted in *A Letter to Eve*: “If you want to have freedom, you have to have great anger Eve, go tell Adam we have to build a new garden for all God's children.” His song became an anthem for women everywhere. By this time, however, it would not be an overstatement to say that Conley herself was already sealing an unconscious bargain with the devil in the overwhelmingly male world of academic medicine. In exchange for tolerating sexual harassment and gender discrimination toward her and other women in her work place, she was allowed to play at being “one of the boys.”

Indeed, Conley herself ventriloquizes sexist attitudes in some dismissive early comments about other women: e.g., stereotyping some nurses as having entered their profession to “land” a physician-husband; apparently thinking herself enlightened to “find that nurses enjoy being part of the decision making;” and implying that secretaries, nurses, and wives of her fellow neurosurgeons are more appropriately “honey” than Conley. The insight and motivation necessary to fight for real respect at work were therefore long in coming for Conley, for whom it took 30 more years to recognize that she could not win equal treatment for herself or other women in medicine through her sufferance. Eventually,

Conley rose to be one of the highest ranking women in academic medicine as well as her speciality of neurosurgery. Her encounters with blatant sexism, however, are the core of her book.

When she discovered the folly of her wager, however, upon realizing that the hostile attitudes and behaviors of “the boys” were choking the life out of her own human potential, passion, and talents—along with those of other women—Conley called Adam to the mat.

Walking Out on the Boys is Conley's commanding first person account of the effects of sexual harassment and gender discrimination on women in

Conley's encounters with blatant sexism are the core of her book

academic medicine; the callous uprooting of her own neurosurgical career which forced her to acknowledge these harms; and her ongoing attempts to cure medicine of sexism.

To dismiss Conley's painfully recognizable account of institutionalized sexism in academic medicine as “academic politics,” or worse yet suggest that readers might “relish” the political “maneuvering” or “in-fighting” detailed therein — as other reviewers of this book have done — is to miss her point. Similarly, to characterize Conley's concrete, personalized documentation of gender discrimination in medical education and practice as “parochial,” is even more perilously to risk not seeing its implications for all women and men. Such comments

are examples of the very complacency from outsiders to academics that enables the social injustices Conley so compellingly documents to thrive and reproduce, unchecked by social censure or legal enforcement. Conley's point is not merely that injustices are being perpetrated by sexist individuals in medicine, causing harm to her and other individual women working therein, but that the institution of academic medicine is deeply saturated with sexist values, shaping gender discrimination and sexual harassment into accepted attitudes and behaviors. This status quo, she argues, is "maintained at almost any cost, including lying, cover-up,

chilling comments Conley relays is made by a lawyer from another academic institution, who responds to Conley's "victory" in catalyzing the termination of Stanford's unscrupulous Dean of Medicine saying he would have advised that Dean: "no matter what, don't ever let her come back on the faculty." Admittedly, Conley's broader argument is obfuscated by her slow pacing (almost two thirds into her book) in revealing her dawning realization of the implications of her own unfair treatment for others.

Apart from its compelling social justice argument, the main value of Conley's book is its remarkably well-documented exposé of sexism rife at

riculum"; lawyers seeking to enforce civil rights; and all who may one day be patients or family members of patients, and possibly be confronted by a sexist medical culture which destroys human potential, and thus serves no woman, man, or society.

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The status quo "is maintained at almost any cost, including lying, cover-up, secrecy, and deceit when needed."

secrecy, and deceit when needed," through a rigidly hierarchical power structure, with serious far-reaching harms to women, enlightened men (including Conley's husband, supportive male colleagues, and young male students attempting to change this destructive culture), and society as well.

Among the practices Conley describes in detail are: ignoring or protecting repeat offenders (sometimes for decades); dismissing injustices as "personality conflicts," or applying psychiatric labels to the "difficult" or "crazy" women who dare to challenge inappropriate attitudes and behavior; and exerting any hostility or pressure necessary to drive such women out of particular institutions or out of academic medicine altogether. Indeed, one of the most

her own institution. No other book on the subject systematically translates the realities of sexism too prevalent in academic medicine, including its self-protecting and self-perpetuating strategies into a written account. The book therefore fills this gap and advances multiple important goals including: exposing and publicly censuring sexist attitudes and behaviors in medicine for a broader audience, and enabling their further study so that universities themselves, lawyers, and other concerned members of society can devise more effective deterrents and controls. This book can be highly recommended to women and men alike, especially those in (or planning to enter) academic medicine; educators and sociologists interested in addressing aspects of medicine's "hidden cur-

WHAT MAKES STEINEM RUN?

Gloria Steinem: Her Passions, Politics, and Mystique

By Sydney Ladensohn Stern
(Birch Lane Press, 1997. 288 pp. \$27.50)

Reviewed by Ruth Zoe Ost

Biographers — and arguably book reviewers — are always accidental autobiographers. In Sydney Ladensohn Stern's biography, *Gloria Steinem: Her Passions, Politics, and Mystique*, the author reveals her fascination with every detail of feminist hero Gloria Steinem's remarkable life, though some fascinations are more equal than others, notably the personal rather than the political.

Working as a scholarly paparazzi, Stern conducted extensive interviews with countless friends, colleagues and even Gloria Steinem herself; she read Steinem's work; she annotated her research in long, well-documented endnotes. From these data, Stern works at drawing a psychological pic-

ture of Steinem. For all her major feminist accomplishments, which Stern lavishly admires, Steinem fails to integrate her public and private selves. Stern locates the source of the problem in Steinem's difficult and privately humiliating childhood and adolescence. Gloria's obese, adventuring failure of a father divorced her mother, leaving Gloria herself as sole caretaker of this bright but deeply disturbed woman. Stern chronicles Gloria's escape from Toledo, Ohio; her year "Abloom in Georgetown" as a high school senior; her Phi Beta Kappa years at Smith College (with the obligatory junior year abroad);

than "An Abortion Alone" or "A Feminist is Born." Her affair with Mort Zuckerman gets two chapters, the battle over ratification of the Equal Rights Amendment gets a couple of pages, the death of her father gets a paragraph.

In the chapter, "Fighting the Communists," Stern focuses on Steinem's central role as an ISI director (Independent Service for Information) at the Vienna Youth Festival yet offers this detail: "Every morning the ISI leaders gathered to decide the day's plans. Zbigniew Brzezinski, who later became President Jimmy Carter's national

positions in the world to which she aspired. In each relationship, Gloria, at least in part, had been trying on an identity. Therefore, their individual attractions notwithstanding, the fact that Gloria chose one black or Latino lover after another for the next seven years appeared to be, to some extent an act of self definition." She does not explain the assumptions behind her claim that these generic successful attractive and adoring men of color were useful to Gloria. Did these relationships advance Gloria's understanding of oppression? Did they contribute to her development as a feminist? Were men of color essential? Some familiarity with the complex issues of the construction of identity, especially surrounding issues of race and gender, are devoutly to be wished in a biographer.

What is missing in the balance of this biography is a privileging of the texture of her relationships, ironically, with women. Stern makes it clear that Gloria is a champion of all women and all oppressed people, yet she rarely brings us close to the geography of any of those relationships. Betty Friedan gets coverage, but this is cast as the battle between "Ozma and the wicked Witch," and the beautiful (and thus heterosexually desirable) feminist wins. Alice Walker and Bell Hooks are cited as Steinem's good friends, but Stern does not bring the reader inside these friendships. If Walker and Hooks insisted that privacy matters, Stern still might have speculated on how these two women, these two *black* women, fit into Gloria's story – as she attempted in her discussion of Gloria's black male lovers.

In contrast with the way men tell their histories, Stern remarks Gloria is, "Apparently incapable of presenting her own history in a straightforward

For all her major feminist accomplishments, Steinem fails to integrate her private and public selves.

her "Passage to India"; her infamous Playboy Bunny tale; her abortion; the belated birth of her feminist consciousness; the births of *Ms. Magazine* and NOW; her publishing history; her cosmetic surgery; her breast cancer. Stern writes thin descriptions but produces a thick book ostensibly covering all of Steinem's life to date. Indeed, she uncovers much more than Carolyn G. Heilbrun's 1995 biography, *The Education of a Woman: The Life of Gloria Steinem*.

Overall, though, it is Steinem's relationships with men which preoccupy Stern. One reading of Stern's narrative is that even this famous feminist is only as interesting as the upwardly mobile men in her life. As evidence, "Some Enchanted Lovers: Ted Sorenson, Mike Nichols and Herb Sargent," is a longer chapter

security advisor, recalls, "We would have strategizing sessions in the little hotel where some of us stayed. I remember Gloria lying in bed in a sort of frilly robe while the rest of us sat around the bed strategizing." Stern does not annotate this rich moment. What did Brzezinski find amusing? Did he remember what she said? Did the men take her seriously? The interviews seem to stop just short of a feminist agenda — and far from a feminist hagiography.

When Stern does look hard at how Steinem's relationship with men figure in her development as a feminist, she offers some unexpected insight. For example, in her analysis of Steinem's "romantic relationships with black men," she comments; "Her lovers had been attractive, lovable men who adored and were kind to her, but they were also men with

ward, unapologetic that-was then, this-is now manner." Without reflecting on why men might tell their stories differently from women and how that might matter, Sydney Ladensohn Stern aligns with the dominant discourse and sets out to do justice to Steinem's life. "Feminists everywhere" — to whom *Gloria Steinem: Her Passions, Politics, and Mystique* is dedicated — may think there is more to be said.

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"UNMASKING" EMPLOYMENT DIVERSITY PROGRAMS

The Diversity Machine: The Drive to Change the 'White Male Workplace'

By Frederick Lynch (Free Press, 1997. 416 pp. \$27.50.)

Reviewed by Robert Hollsworth

Frederick Lynch's new book is a critical examination of the growing effort to promote diversity inside the American workplace. Author of *Invisible Victims: White Males and the Crisis of Affirmative Action*, Lynch has extended his analysis to the array of consultants, videos, and human resource managers that have emerged during the decade to preach the word that diversity is good social policy and sound business practice.

Lynch's investigation of how diversity has obtained a foothold in the American workplace takes two principal directions. First, he furnishes an extended report, almost anthropological in nature, on what might be called the diversity industry. Lynch describes the backgrounds, business practices, client bases, and profession-

al networks of consultants, human resource managers, and university based trainers who are hired by organizations to enhance the management of diversity. He outlines the internal tensions between those who promote diversity as a moral extension of the civil rights movement and those who believe that it should be endorsed because of its potential to improve the corporate bottom line.

Second, Lynch furnishes extended case studies of three organizations that made explicit commitments to implementing diversity principles. He reports on the effort of the Los Angeles County Sheriff's Department to offer

The level of "buy-in" is rarely sufficient to transform the organization in the manner that is apparently required. Diversity consultants to American corporations routinely complain that their ideas are rarely fully integrated into the organizational culture. The restructuring and reengineering of American corporations resulted in downsizings and rightsizings that frequently eliminated the positions of those who were responsible for diversity management. Even where there was greater "buy-in," the results have often been less than auspicious. Lynch suggests, for example, that diversity plans in

Lynch furnishes an extended report on the diversity industry

multicultural and sensitivity training to its officers and staff as a means of reducing the department's vulnerability to lawsuits and enhancing its perception in the community. He explores the attempt by the California Community College System to recruit a student body and a faculty and administration that would look more like the demographic composition of the population at large. And he analyzes the results of the University of Michigan's commitment to "create a multicultural university of the 21st century" in an environment where the values of diversity often conflicted with established academic norms.

Although Lynch concedes that the diversity movement may have generated some positive organizational changes, his overall assessment is largely negative. Lynch seems to argue that diversity policies never really achieve their intended goals.

community colleges and universities have come up against not only the same economic pressures evident in the corporate world, but against entrenched values and established practices that did not easily accommodate the new demands.

It is unlikely that Lynch would be pleased if most of the diversity programs that he describes were actually achieving their aims. He contends that the core principles of the diversity movement are, at best internally inconsistent and, at worst, significant departures from the organizing values of American constitutional democracy. He suggests that group representation is antithetical to the principle of individual achievement that is deeply embedded in American culture. He believes that the principle of color-blindness offers better protection against discrimination than does sensitivity training that can unwittingly reinforce the stereotypes that lead

to discriminatory behavior. He maintains that successful organizations often establish competitive, demanding cultures that exclude many people from being successful participants, but which are absolutely necessary. Efforts to alter these cultures for political goals could eventually have serious consequences for the capacity of the organization to compete in the environment.

Lynch's work is likely to reinforce the positions that people already hold about managing diversity. Those who believe it is merely a politically correct means of implementing discriminatory affirmative action beliefs will point

individuals because of their race or gender.

When writing about subjects such as diversity and affirmative action, it is often very difficult to get beyond the ideological positions that have shaped the debate in the political arena. But this is precisely what is needed if the dialogue on race is to be anything more than an exchange of ideological gunfire. Proponents of diversity and affirmative action have to be willing to take a critical look at the policies they have designed and implemented in light of the values held by most Americans of all races. Opponents of the diversity move-

Diversity plans have come up against entrenched values and established practices

to the book as valuable confirmation of their expectations. As the blurbs that accompany the volume indicate, critics of affirmative action believe that Lynch has unmasked the new instruments that its supporters have invented to perpetuate race and gender based double standards. Individuals who believe that the attention paid to diversity management is generally good, even with the excesses that Lynch illuminates, are unlikely to change their minds by reading this book. They will undoubtedly argue that Lynch does not exhibit the empirical rigor that is typically expected of social scientists. They will probably also contend that Lynch is much more critical of attempts to implement policies that take diversity seriously than of long standing practices that hindered the opportunities of

ment and affirmative action need to take seriously the perceptions of members of the minority community regarding their continuing experience of discrimination and their concerns about obstacles to fair treatment.

Lynch's book is another loud and powerful volley in the cultural war over race, but it may not be much of a contribution to the ultimate armistice.

Robert Hollsworth is Director of the Center for Public Policy at Virginia Commonwealth University.

DEMOLISHING ANTEBELLUM PLANTATION MYTHS

Slaves in the Family

By Edward Ball (Farrar Straus & Giroux, 1998. 272 pp. \$30.)

Reviewed by Jacqueline Jones

This remarkable book consists of several intertwined stories. One focuses on the history of the descendants of Elias Ball, a young English man of modest means who inherited a 740-acre plantation on the Cooper River, in the vicinity of Charleston, South Carolina, in 1698. Elias Ball parlayed that inheritance into a thriving rice plantation, and his white descendants were among the most prominent and wealthy rice planters of colonial, and then antebellum, South Carolina.

Slaves in the Family reconstructs the history of the enslaved workers who toiled on the Ball family plantations, some of whom too were descended from the patriarch Elias Ball (he apparently had two children by his enslaved domestic servant Dolly). The author also provides a sweeping overview of the history of South Carolina rice cultivation through the generations, tracing the crop from its West-African origins (enslaved workers had more experience growing it than had English colonists) and its demise after the Civil War.

Additionally, this book also tells the story of Edward Ball's attempts to establish contact with the descendants of the Ball family slaves, a quest that took him to Charleston, Atlanta, Philadelphia, small settlements along the Cooper River in South Carolina, and Sierra Leone in West Africa, among other places. It is this last story that is particularly fascinating, for it represents a journey of hope and rec-

conciliation among the far-flung members of an extended southern family. Some people with enslaved ancestors welcomed Edward Ball in his quest, while others did not. All of these stories together yield a significant slice of American history, one that reveals the common and tangled genealogical roots linking Americans who identify themselves as “black” and Americans who identify themselves as “white.”

Edward Ball demonstrates a great deal of skill and resourcefulness in recapturing the history of these particular families in a particular place over the sweep of American history.

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He pored over the Ball Family papers, a treasure trove of documents, many on microfilm, housed in various southern libraries, as well as materials in the National Archives and secondary monographs dealing with southern history. He located old portraits paintings and photographs, some of which strikingly revealed the family resemblance among the Balls and their descendants of both races. He mined gravestone inscriptions and explored ancient cemeteries for clues about family relationships.

Most compelling of all is his use of information gleaned from oral histories provided by African-American men and women of all ages who have preserved the memory of their forbearers in stories that have been handed down through the generations. Throughout the book Ball maintains an admirable detachment

and lack of sentimentality in describing his own ancestors as well as the present-day rituals that memorialize the rice-country planter elite (for example, the Society for the Preservation of Spirituals, a group of whites that renders African-American call-and-response songs in “black” dialect).

Edward Ball begins his quest with a piece of lore from his own immediate relatives — that the Ball masters and mistresses, some of whom lorded over hundreds of slaves at a time, were particularly “good owners,” eschewing harsh punishment of their workers and keeping families intact. In fact, the author is able to show that these beliefs constitute a peculiar form of mythology among Elias Ball’s white descendants. The historical record, bolstered by the oral tradition of the descendants of slaves, provides evidence that masters and the sons of masters sexually abused enslaved women, and that whites in control of the family empire of plantations at times tortured and dismembered recalcitrant slaves. Plantation owners felt no compunction about selling slave family members away from each other in order to replenish their own cash flow, open new rice lands, celebrate the marriage of a daughter or the birth of a grandson, or settle the eState of a deceased planter. As it turns out, the Balls were neither better nor worse than other slave owners. As Edward Ball makes abundantly clear, the term “good master” is, in the end, an oxymoron.

This book places the notion of “family” within its rightful, biracial context in America — past, present, and future.

Dr. Jacqueline Jones is a professor and chairs the history department at Brandeis University.

SPYING ON BLACK AMERICANS

Seeing Red: Federal Campaigns Against Black Militancy, 1919-1925

By Theodore Kornweibel, Jr. (Indiana University Press, 1998. 219 pp. \$30.)

Reviewed by Michael K. Fauntroy

“Modern America’s political intelligence system—surveillance, investigation, and spying on individuals because of fear or dislike of their beliefs, resulting in harassment, intimidation, or prosecution—came of age during World War I...and it would thenceforth justify its existence by identifying a never-ending series of national security threats.” This is the framework through which San Diego State University Professor of African American history Theodore Kornweibel, Jr. writes *Seeing Red: Federal Campaigns Against Black Militancy, 1919-1925*.

This meticulously researched book examines efforts by the Federal government to undermine the activities of black nationalists and other leftists, or those perceived to be so, who were gaining footholds around the country in the early decades of this century. The Bureau of Investigation (later to become the Federal Bureau of Investigation) viewed these individuals and organizations as being a threat to American sovereignty — often by what they said, not what they did. Kornweibel explores an area of American political intelligence which has been consistently ignored by academics and other writers. In doing so, he exposes the full extent to which the government would go to shut down these entities, such as using black FBI staffers to infiltrate loyal black American organizations and to harass

law-abiding black leaders.

Kornweibel reviews the growth of suppression tactics, citing the Civil War as a landmark in the movement toward domestic intelligence gathering. He cites evidence of Federal agencies encouraging local police forces to root out "troublemakers" and anti-union activity as examples of governmental spying ascending to new levels. This included work by the Department of Justice which, between 1892 and 1896, broke the Pullman Strike and arrested dozens of union leaders. As Kornweibel notes, "The Federal government was becoming well practiced in the suppression of

over a dozen such publications under suspicion, special attention is given to the *Chicago Defender* which, by virtue of its multi-State circulation of over 140,000, the Federal government viewed as the prime contributor to racial hostilities during this period. Robert Abbott, editor of the *Defender*, was consistently harassed, investigated, and threatened in an effort to get him to tone down the paper's pro-black rhetoric.

Kornweibel does an outstanding job of using the exact language of FBI reports to tell the story of the Federal government's suppression of black militancy through its investigative

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unpopular political and economic advocacy." By 1917, an intricate network of Federal intelligence gatherers had been developed, dedicated to spy catching, union busting, radical hunting, press, mail, cable, and telegraph censoring, and, in general, enforcing conformity and patriotism.

The most noteworthy chapter of the book focuses on the investigation and intimidation of black newspapers and periodicals during World War I. Many whites viewed these publications as subversive to the war effort because of their staunch outspokenness on the issue of race. Some even went so far as to charge that the publications were tools of German interests. While there were

activities. By letting the governments' records speak for themselves he effectively shields his findings and conclusions from charges of being one-sided. Overall, this is a fascinating, important examination of a largely forgotten period in American history, and it deserves to be widely read.

Michael K. Fauntroy, formerly a civil rights analyst with the U.S. Commission on Civil Rights, now teaches political science at Howard University. His Ph.D. dissertation will explore the civil rights implications of congressional oversight vis-à-vis the District of Columbia.

Additional Books Noted:

Title	Author	Publisher	Date	Pages	Price
1. A Matter of Black and White	Ada Lois Sipuel Fisher	University of Oklahoma	1996	188	None
2. A Nationality of Her Own	Candice Lewis Bredhenner	University of California Press	1998	294	\$45.00
3. A New Brith of Freedom	Charles L. Black, Jr.	Grosset/Putnam	1997	175	\$22.95
4. African American Women and the Vote	Ann Gordon Bettye Collier-Thomas	University of Massachusetts Press	1997	217	None
5. An Easy Burden (2x)	Andrew Young	Harper Collins	1996	550	\$16.00
6. Between God and Gangsta Rap	Michael Eric Dyson	Oxford University Press	1996	210	\$23.00
7. Black Anxiety, White Guily, and the Politics of Status Frustration	T. Alexander Smith and Lenahan O'Connor	Praeger	1997	204	None
8. Black Liberation in Conservative America	Manning Marable	South End Press	1997	285	\$16.00
9. But for Birmingham	Glen T. Eskew	University of North Carolina Press	1997	434	\$19.95
10. Civil rights and Race Relations in the Post Reagan-Bush Era	Samuel L. Myers, Jr.	Praeger	1997	269	\$59.95
11. Daybreak of Freedom	Stuart Burns	University of North Carolina Press	1997	359	\$17.95
12. Ending Affirmative Action	Terry Eastland	Basic Books	1996	218	\$22.00
13. Female Subjects in Black and White	Elizabeth Abel, Barbara Christian Helene Moglen	University of California Press	1997	373	\$48.00
14. Helen Hunt Jackson	Valerie Sherer Mathes	University of Oklahoma Press	1997	235	None

Additional Books Noted:

Title	Author	Publisher	Date	Pages	Price
15. Heterogenities	Robert John Ackerman	University of Massachusetts Press	1996	218	\$45.00
16. Hoods and Shirts	Philip Jenkins	University of North Carolina Press	1997	255	\$29.95
17. How Long? How Long ?	Belinda Robnett	Oxford University Press	1997	256	None
18. Human Dignity and Conmporary Liberalism	Brad Stetson	Praeger	1998	186	\$55.00
19. Killing the White Man's Indian	Fergus M. Bordewich	Doubleday	1996	400	\$27.50
20. Lift Up your Voice Like a Trumpet	Michael B. Friedland	University of North Carolina Press	1998	326	\$49.95
21. Making Peace with the 60's	David Burner	Princeton University Press	1996	295	None
22. Mama's Girl	Veronica Chambers	Riverhead Books	1996	194	\$22.95
23. Race Diecrimination in Public Higher Education	John B. Williams	Praeger	1997	203	None
24. Race Gender and Work	Teeresa Amott and Julie Matthaei	South End Press	1996	442	\$21.00
25. Race Law and Culture	Austin Sarat	Oxford University Press	1997	228	\$16.95
26. Religion and the Racist Right	Michael Barkun	University of North Carolina Press	1997	330	None
27. Salud	Jane L. Delgado	Harpers Collins Publishers	1997	384	\$20.00
28. So Ordered	Ann Hopkins	University of Massachusetts Press	1996	432	\$34.95
29. Southern Journey	Tom Dent	William Morrow and Company, Inc.	1997	400	\$25.00

To the Editor:

I was very impressed with your journal. Please add me to the mailing list.

Robin Orłowski
Denton, TX

To the Editor:

I have just seen the premier issue of your journal and find it quite handsome. I particularly enjoyed the articles on immigration and on the ADA.

A. Casa
Brooklyn, NY

To the Editor:

The first issue of the Civil Rights Journal was excellent. I look forward to reading many more.

Donna K. Baldwin
Kansas City, MO

To the Editor:

I have just finished reading the premier issue of the Civil Rights Journal. It is really excellent. I found of particular value the article, "Immigration, Civil Rights, and American Ambivalence," a subject which is of (special) interest to me.

Samuel Rabinove, *Legal Director*
The American Jewish Committee

To the Editor:

Thank you for sending me the commemorative issue of the Civil Rights Journal. It is handsomely mounted and looks interesting.

I was struck, however, that in a publication that purports to celebrate 40

years of the Commission, there is so little about the history and contribution of the Commission. Indeed, apart from a superficial essay by Hugh Davis Graham, I don't find anything.

This did not have to be. There are people still around who really understand the role and contribution of the Commission during the civil rights revolution. And there are those who were participants at the Commission — commissioners like Hesburgh, Freeman, Spottswood Robinson, Saltzman, staff directors like Glickstein, Bernhard and yours truly; and many staffers who went on to do other important things.

So I am somewhat mystified by what I regard as a glaring omission. In the 80s, I discovered that many of the Commission reports from the 50s, 60s and 70s were not available at the agency's library and I was later informed that some of the films made by the Commission were discovered in disarray on a warehouse floor. The current omission is not as Orwellian, but it is troubling.

With all of the problems today, this is not one I am going to stew about. But I contrast the Commission's treatment of its 40th anniversary with that of the Civil Rights Division which has taken care to map out occasions for documenting its history and achievements.

Maybe the Commission, having gone through some trauma, is not prepared to reconnect with its past. If so, that is sad.

William Taylor, *Staff Director*
USCCR, 1965-68.

Editor's Note:

Although we obviously could, and do, get an argument on that decision, the editors decided that in light of our Federal agency's responsibility to address current and developing civil rights problems, even an issue commemorating the Commission's 40th anniversary had to be more about what remained to be achieved than what had been achieved. In putting the emphasis on the present and future instead of the past, we would like to think that we were emulating the Commission of the 1960s.

To the Editor:

Thank you for sending me the last two issues of the Civil Rights Journal. I compliment you on two very fine publications. Although I did complain about what was omitted from the 40th Anniversary Issue, the persons from whom you solicited articles are impressive.

I look forward to continuing to receive Commission publications, particularly the Civil Rights Journal.

Howard A. Glickstein, *Dean*
Jacob D. Fuchberg Law Center
Touno College

To the Editor:

I think that your journal is factual, informative, and important. Please place me on your free mailing list to continue receiving it.

George Wilson
Galveston, TX

THE COMMISSION'S LIBRARY

The Robert S. Rankin Civil Rights Memorial Library, an important part of the U.S. Commission on Civil Rights, contains more than 50,000 reference works, including a comprehensive collection of reports, transcripts, and texts. Also included are copies of some 200 periodicals (notably journals about civil rights and minority issues and the law) and various newspapers. Information on microfilm and microfiche amounts to thousands of reels and files. The library, open to the public from 10 a.m. until 4 p.m. Monday through Friday, is situated in the Commission's headquarters, 624 Ninth Street, N.W., Washington, DC 20425.

The library is the largest collection of materials in the country focused on civil rights. The facilities are used extensively by members of Congress, government agencies,

private organizations, and individual citizens.

The library grew out of the Technical Information Center, which was established within the Commission in the late 1960s to support research, fact-finding, and reporting on civil rights matters. In 1974, under authorization of Congress, the facility was converted into the National Clearinghouse Library, serving as a repository for civil rights information and related topics.

It has all publications that derived from the Commission's activities since the Federal agency was first established in 1957. These include statutory reports, clearinghouse materials, briefing papers, transcripts of hearings, and State Advisory Committee reports.

A staff is available to assist library visitors as well as Commission personnel. They are Librarian Barbara

Fontana and Library Technician Vanessa Williamson.

Most books and other material can be borrowed, for periods of two or three weeks, depending on the item.

For further information, the library may be telephoned at (202) 376-8110.

Copies of Commission publications may also be obtained free and retained. The voice mail number for requesting a publication or the Catalog of Publications is (202) 376-8128.

The library was named in honor of a Commissioner who served for 16 years beginning in 1960. Dr. Rankin was a faculty member at Duke University from 1927 and chairperson of the Department of Political Science from 1948 until 1964 and afterward professor emeritus.

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