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Genetic Encores: The Ethics of Human Cloning

The successful cloning of an adult sheep, announced in Scotland this past February, is one of the most dramatic recent examples of a scientific discovery becoming a public issue. During the last few months, various commentators—scientists and theologians, physicians and legal experts, talk-radio hosts and editorial writers—have been busily responding to the news, some calming fears, other raising alarms about the prospect of cloning a human being. At the request of the President, the National Bioethics Advisory Commission (NBAC) held hearings and prepared a report on the religious, ethical, and legal issues surrounding human cloning. While declining to call for a permanent ban on the practice, the Commission recommended a moratorium on efforts to clone human beings, and emphasized the importance of further public deliberation on the subject.

An interesting tension is at work in the NBAC report. Commission members were well aware of “the widespread public discomfort, even revulsion, about cloning human beings.” Perhaps recalling the images of Dolly the ewe that were featured on the covers of national news magazines, they noted that “the impact of these most recent developments on our national psyche has been quite remarkable.” Accordingly, they felt that one of their tasks was to articulate, as fully and sympathetically as possible, the range of concerns that the prospect of human cloning had elicited.

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In This Issue

GENETIC ENCORES: THE ETHICS OF HUMAN CLONING

Robert Wachbroit1

BROWN BLUES: RETHINKING THE INTEGRATIVE IDEAL

Drew S. Days, III8

PRESERVING THE WATERMEN'S WAY OF LIFE

David Wasserman and Mick Womersley15

NEGOTIATING JERUSALEM

Jerome M. Segal21

Yet it seems clear that some of these concerns, at least, are based on false beliefs about genetic influence and the nature of the individuals that would be produced through cloning. Consider, for instance, the fear

*The genetic contribution
to the traits we value most deeply,
from intelligence to compassion,
is limited and indirect.*

that a clone would not be an "individual" but merely a "carbon copy" of someone else—an automaton of the sort familiar from science fiction. As many scientists have pointed out, a clone would not in fact be an identical copy, but more like a delayed identical twin. And just as identical twins are two separate people—biologically, psychologically, morally and legally, though not genetically—so, too, a clone would be a separate person from her non-contemporaneous twin. To think otherwise is to embrace a belief in genetic determinism—the view that genes determine everything about us, and that environmental factors or the random events in human development are insignificant.

The overwhelming scientific consensus is that genetic determinism is false. In coming to understand the ways in which genes operate, biologists have also become aware of the myriad ways in which the environment affects their "expression." The genetic contribution to the simplest physical traits, such as height and hair color, is significantly mediated by environmental factors (and possibly by stochastic events as well). And the genetic contribution to the traits we value most deeply, from intelligence to compassion, is conceded by even the most enthusiastic genetic researchers to be limited and indirect.

It is difficult to gauge the extent to which "repugnance" toward cloning generally rests on a belief in genetic determinism. Hoping to account for the fact that people "instinctively recoil" from the prospect of cloning, James Q. Wilson wrote, "There is a natural sentiment that is offended by the mental picture of identical babies being produced in some biological factory." Which raises the question: once people learn that this picture is mere science fiction, does the offense that cloning presents to "natural sentiment" attenuate, or even disappear? Jean Bethke Elshtain cited the nightmare scenarios of "the man and woman on the street," who imagine a future populated by "a veritable army of Hitlers, ruthless and remorseless bigots who kept reproducing themselves until they had finished what the historic Hitler failed to do: annihilate us." What happens, though, to the "pity and terror" evoked by the topic of cloning when such scenarios are deprived (as they deserve to be) of all credibility?

Richard Lewontin has argued that the critics' fears—or at least, those fears that merit consideration in formulating public policy—dissolve once genetic determinism is refuted. He criticizes the NBAC report for excessive deference to opponents of human cloning, and calls for greater public education on the scientific issues. (The Commission in fact makes the same recommendation, but Lewontin seems unimpressed.) Yet even if a public education campaign succeeded in eliminating the most egregious misconceptions about genetic influence, that wouldn't settle the matter. People might continue to express concerns about the interests and rights of human clones, about the social and moral consequences of the cloning process, and about the possible motivations for creating children in this way.

Interests and Rights

One set of ethical concerns about human clones involves the risks and uncertainties associated with the current state of cloning technology. This technology has not yet been tested with human subjects, and scientists cannot rule out the possibility of mutation or other biological damage. Accordingly, the NBAC report concluded that "at this time, it is morally unacceptable for anyone in the public or private sector, whether in a research or clinical setting, to attempt to create a child using somatic cell nuclear transfer cloning." Such efforts, it said, would pose "unacceptable risks to the fetus and/or potential child."

The ethical issues of greatest importance in the cloning debate, however, do not involve possible failures of cloning technology, but rather the consequences of its success. Assuming that scientists were

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able to clone human beings without incurring the risks mentioned above, what concerns might there be about the welfare of clones?

Some opponents of cloning believe that such individuals would be wronged in morally significant ways. Many of these wrongs involve the denial of what Joel Feinberg has called "the right to an open future." For example, a child might be constantly compared to the adult from whom he was cloned, and thereby burdened with oppressive expectations. Even worse, the parents might actually limit the child's opportunities for growth and development: a child cloned from a basketball player, for instance, might be denied any educational opportunities that were not in



Drawing by Ed Gamble

Florida Times-Union

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line with a career in basketball. Finally, regardless of his parents' conduct or attitudes, a child might be burdened by the *thought* that he is a copy and not an "original." The child's sense of self-worth or individuality or dignity, so some have argued, would thus be difficult to sustain.

How should we respond to these concerns? On the one hand, the existence of a right to an open future has a strong intuitive appeal. We are troubled by parents who radically constrict their children's possibilities for growth and development. Obviously, we would condemn a cloning parent for crushing a child with oppressive expectations, just as we might condemn fundamentalist parents for utterly isolating their children from the modern world, or the parents of twins for inflicting matching wardrobes and rhyming names. But this is not enough to sustain an objection to cloning itself. Unless the claim is that cloned parents cannot help but be oppressive, we would have cause to say they had wronged their children only because of their subsequent, and avoidable, sins of bad parenting—not because they had chosen to create the child in the first place. (The possible reasons for making this choice will be discussed below.)

We must also remember that children are often born in the midst of all sorts of hopes and expectations; the idea that there is a special burden associated with the

thought "There is someone who is genetically just like me" is necessarily speculative. Moreover, given the falsity of genetic determinism, any conclusions a child might draw from observing the person from whom he was cloned would be uncertain at best. His knowledge of his future would differ only in degree from what many children already know once they begin to learn parts of their family's (medical) history. Some of us knew that we would be bald, or to what diseases we might be susceptible. To be sure, the cloned individual might know more about what he or she could become. But because our knowledge of the effect of environment on development is so incomplete, the clone would certainly be in for some surprises.

Finally, even if we were convinced that clones are likely to suffer particular burdens, that would not be enough to show that it is wrong to create them. The child of a poor family can be expected to suffer specific hardships and burdens, but we don't thereby conclude that such children shouldn't be born. Despite the hardships, poor children can experience parental love and many of the joys of being alive: the deprivations of poverty, however painful, are not decisive. More generally, no one's life is entirely free of some difficulties or burdens. In order for these considerations to have decisive weight, we have to be able to say that life doesn't offer any compensating benefits. Concerns

**Ethics of Consumption:
The Good Life, Justice, and Global
Stewardship**

**David A. Crocker and
Toby Linden, editors**

Scholars in diverse fields now agree on the importance of investigating the impact of consumption practices on the global environment, quality of life, and international justice. In this comprehensive collection of essays, respected scholars from many disciplines—philosophy, economics, sociology, political science, demography, theology, history, and social psychology—examine the causes, nature, and consequences of present-day consumption patterns in the United States and throughout the world. Individual essays evaluate the impact of consumption practices on our own lives, our institutions, other people, and the environment. They also give explicit attention to the principles relevant to a consumption ethic, as well as to the policies and practices that such an ethic permits or requires.

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—James W. Nickel, University of Colorado

"Conscientious consumption is good for the consumer, fair to other people, and environmentally sustainable. It is benign in its impact on people and on the environment, and equitable. David Crocker and the eminent authors he has gathered in this provocative book examine the ethics of consumption in a novel and passionately dispassionate way. It is the best book on an important but neglected topic."

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expressed about the welfare of human clones do not appear to justify such a bleak assessment. Most such children can be expected to have lives well worth living; many of the imagined harms are no worse than those faced by children acceptably produced by more conventional means. If there is something deeply objectionable about cloning, it is more likely to be found by examining implications of the cloning process itself, or the reasons people might have for availing themselves of it.

Concerns about Process

Human cloning falls conceptually between two other technologies. At one end we have the assisted reproductive technologies, such as in vitro fertilization, whose primary purpose is to enable couples to produce a child with whom they have a biological connection. At the other end we have the emerging technologies of genetic engineering—specifically, gene transplantation technologies—whose primary purpose is to produce a child that has certain traits. Many proponents of cloning see it as part of the first technology: cloning is just another way of providing a couple with a biological child they might otherwise be unable to have. Since

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this goal and these other technologies are acceptable, cloning should be acceptable as well. On the other hand, many opponents of cloning see it as part of the second technology: even though cloning is a transplantation of an entire nucleus and not of specific genes, it is nevertheless an attempt to produce a child with certain traits. The deep misgivings we may have about the genetic manipulation of offspring should apply to cloning as well.

The debate cannot be resolved, however, simply by determining which technology to assimilate cloning to. For example, some opponents of human cloning see it as continuous with assisted reproductive technologies; but since they find those technologies objectionable as well, the assimilation does not indicate approval. Rather than argue for grouping cloning with one technology or another, I wish to suggest that we can best understand the significance of the cloning process by comparing it with these other technologies, and thus broadening the debate.

To see what can be learned from such a comparative approach, let us consider a central argument that has been made against cloning—that it undermines the

structure of the family by making identities and lineages unclear. On the one hand, the relationship between an adult and the child cloned from her could be described as that between a parent and offspring. Indeed, some commentators have called cloning "asexual reproduction," which clearly suggests that cloning is a way of generating *descendants*. The clone, on this view, has only one biological parent. On the other hand, from the point of view of genetics, the clone is a

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the parent, so the worry might go,
who is responsible for the clone?*

sibling, so that cloning is more accurately described as "delayed twinning" rather than as asexual reproduction. The clone, on this view, has two biological parents, not one—they are the same parents as those of the person from whom that individual was cloned.

Cloning thus results in ambiguities. Is the clone an offspring or a sibling? Does the clone have one biological parent or two? The moral significance of these ambiguities lies in the fact that in many societies, including our own, lineage identifies responsibilities. Typically, the parent, not the sibling, is responsible for the child. But if no one is unambiguously the parent, so the worry might go, who is responsible for the clone? Insofar as social identity is based on biological ties, won't this identity be blurred or confounded?

Some assisted reproductive technologies have raised similar questions about lineage and identity. An anonymous sperm donor is thought to have no parental obligations towards his biological child. A surrogate mother may be required to relinquish all parental claims to the child she bears. In these cases, the social and legal determination of "who is the parent" may appear to proceed in defiance of profound biological facts, and to subvert attachments that we as a society are ordinarily committed to upholding. Thus, while the *aim* of assisted reproductive technologies is to allow people to produce or raise a child to whom they are biologically connected, such technologies may also involve the creation of social ties that are permitted to override biological ones.

In the case of cloning, however, ambiguous lineages would seem to be less problematic, precisely because no one is being asked to relinquish a claim on a child to whom he or she might otherwise acknowledge a biological connection. What, then, are the critics afraid of? It does not seem plausible that someone would have herself cloned and then hand the child over to her parents, saying, "You take care of her! She's *your* daughter!" Nor is it likely that, if the cloned individual

did raise the child, she would suddenly refuse to pay for college on the grounds that this was not a sister's responsibility. Of course, policymakers should address any confusion in the social or legal assignment of responsibility resulting from cloning. But there are reasons to think that this would be *less* difficult than in the case of other reproductive technologies.

Similarly, when we compare cloning with genetic engineering, cloning may prove to be the less troubling of the two technologies. This is true even though the dark futures to which they are often alleged to lead are broadly alike. For example, a recent *Washington Post* article examined fears that the development of genetic enhancement technologies might "create a market in preferred physical traits." The reporter asked, "Might it lead to a society of DNA haves and have-nots, and the creation of a new underclass of people unable to keep up with the genetically fortified Joneses?" Similarly, a member of the National Bioethics Advisory Commission expressed concern that cloning might become "almost a preferred practice," taking its place "on the continuum of providing the best for your child." As a consequence, parents who chose to "play the lottery of old-fashioned reproduction would be considered irresponsible."

Such fears, however, seem more warranted with respect to genetic engineering than to cloning. By offering some people—in all probability, members of the

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upper classes—the opportunity to acquire desired traits through genetic manipulation, genetic engineering could bring about a biological reinforcement (or accentuation) of existing social divisions. It is hard enough already for disadvantaged children to compete with their more affluent counterparts, given the material resources and intellectual opportunities that are often available only to children of privilege. This unfairness would almost certainly be compounded if genetic manipulation came into the picture. In contrast, cloning does not bring about "improvements" in the genome: it is, rather, a way of *duplicating* the genome—with all its imperfections. It wouldn't enable certain groups of people to keep getting better and better along some valued dimension.

To some critics, admittedly, this difference will not seem terribly important. Theologian Gilbert Meilaender, Jr., objects to cloning on the grounds that children created through this technology would be "designed as a product" rather than "welcomed as a

gift." The fact that the design process would be more selective and nuanced in the case of genetic engineering would, from this perspective, have no moral significance. To the extent that this objection reflects a concern about the commodification of human life, we can address it in part when we consider people's reasons for engaging in cloning.

Reasons for Cloning

This final area of contention in the cloning debate is as much psychological as it is scientific or philosophical. If human cloning technology were safe and widely available, what use would people make of it? What reasons would they have to engage in cloning?

In its report to the President, the Commission imagined a few situations in which people might avail themselves of cloning. In one scenario, a husband and wife who wish to have children are both carriers of a lethal recessive gene:

Rather than risk the one in four chance of conceiving a child who will suffer a short and painful existence, the couple considers the alternatives: to forgo rearing children; to adopt; to use prenatal diagnosis and selective abortion; to use donor gametes free of the recessive trait; or to use the cells of one of the adults and attempt to clone a child. To avoid donor gametes and selective abortion, while maintaining a genetic tie to their child, they opt for cloning.

In another scenario, the parents of a terminally ill child are told that only a bone marrow transplant can save the child's life. "With no other donor available,

the parents attempt to clone a human being from the cells of the dying child. If successful, the new child will be a perfect match for bone marrow transplant, and can be used as a donor without significant risk or discomfort. The net result: two healthy children, loved by their parents, who happen [sic] to be identical twins of different ages."

The Commission was particularly impressed by the second example. That scenario, said the NBAC report, "makes what is probably the strongest possible case for cloning a human being, as it demonstrates how this technology could be used for lifesaving purposes." Indeed, the report suggests that it would be a "tragedy" to allow "the sick child to die because of a moral or political objection to such cloning." Nevertheless, we should note that many people would be morally uneasy about the use of a minor as a donor, regardless of whether the child were a result of cloning. Even if this unease is justifiably overridden by other concerns, the "transplant scenario" may not present a more compelling case for cloning than that of the infertile couple desperately seeking a biological child.

Most critics, in fact, decline to engage the specifics of such tragic (and presumably rare) situations. Instead, they bolster their case by imagining very different scenarios. Potential users of the technology, they suggest, are narcissists or control freaks—people who will regard their children not as free, original selves but as products intended to meet more or less rigid specifications. Even if such people are not genetic determinists, their recourse to cloning will indicate a desire to exert all possible influence over what "kind" of child they produce.

The critics' alarm at this prospect has in part to do, as we have seen, with concerns about the psychological burdens such a desire would impose on the clone. But it also reflects a broader concern about the values expressed, and promoted, by a society's reproductive policies. Critics argue that a society that enables people to clone themselves thereby endorses the most narcissistic reason for having children—to perpetuate oneself through a genetic encore. The demonstrable falsity of genetic determinism may detract little, if at all, from the strength of this motive. Whether or not clones will have a grievance against their parents for producing them with this motivation, the societal indulgence of that motivation is improper and harmful.

It can be argued, however, that the critics have simply misunderstood the social meaning of a policy that would permit people to clone themselves even in the absence of the heartrending exigencies described in the NBAC report. This country has developed a strong commitment to reproductive autonomy. (This commitment emerged in response to the dismal history of eugenics—the very history that is sometimes invoked to support restrictions on cloning.) With the exception

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of practices that risk coercion and exploitation—notably baby-selling and commercial surrogacy—we do not interfere with people's freedom to create and acquire children by almost any means, for almost any reason. This policy does not reflect a dogmatic libertarianism. Rather, it recognizes the extraordinary personal importance and private character of reproductive decisions, even those with significant social repercussions.

Our willingness to sustain such a policy also reflects a recognition of the moral complexities of parenting. For example, we know that the motives people have

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for bringing a child into the world do not necessarily determine the manner in which they raise him. Even when parents start out as narcissists, the experience of childrearing will sometimes transform their initial impulses, making them caring, respectful, and even self-sacrificing. Seeing their child grow and develop, they learn that she is not merely an extension of themselves. Of course, some parents never make this discovery; others, having done so, never forgive their children for it. The pace and extent of moral development among parents (no less than among children) is infinitely variable. Still, we are justified in saying that those who engage in cloning will not, by virtue of this fact, be immune to the transformative effects of parenthood—even if it is the case (and it won't always be) that they begin with more problematic motives than those of parents who engage in the "genetic lottery."

Moreover, the nature of parental motivation is itself more complex than the critics often allow. Though we can agree that narcissism is a vice not to be encouraged, we lack a clear notion of where pride in one's children ends and narcissism begins. When, for example, is it unseemly to bask in the reflected glory of a child's achievements? Imagine a champion gymnast who takes delight in her daughter's athletic prowess. Now imagine that the child was actually cloned from one of the gymnast's somatic cells. Would we have to revise our moral assessment of her pleasure in her daughter's success? Or suppose a man wanted to be cloned and to give his child opportunities he himself had never enjoyed. And suppose that, rightly or wrongly, the man took the child's success as a measure of his own untapped potential—an indication of the flourishing life he might have had. Is *this* sentiment blamable? And is it all that different from what many natural parents feel?

Conclusion

Until recently, there were few ethical, social, or legal discussions about human cloning via nuclear transplantation, since the scientific consensus was that such a procedure was not biologically possible. With the appearance of Dolly, the situation has changed. But although it now seems more likely that human cloning will become feasible, we may doubt that the practice will come into widespread use.

I suspect it will not, but my reasons will not offer much comfort to the critics of cloning. While the technology for nuclear transplantation advances, other technologies—notably the technology of genetic engineering—will be progressing as well. Human genetic engineering will be applicable to a wide variety of traits; it will be more powerful than cloning, and hence more attractive to more people. It will also, as I have suggested, raise more troubling questions than the prospect of cloning has thus far.

—Robert Wachbroit

Sources: National Bioethics Advisory Commission, "Cloning Human Beings: Report and Recommendations" (June 9, 1997); James Q. Wilson, "The Paradox of Cloning," *Weekly Standard* (May 26, 1997); Jean Bethke Elshtain, "Ewogenics," *New Republic* (March 31, 1997); R. C. Lewontin, "The Confusion over Cloning," *New York Review of Books* (October 23, 1997); Leon Kass, "The Wisdom of Repugnance," *New Republic* (June 2, 1997); Susan Cohen, "What is a Baby? Inside America's Unresolved Debate about the Ethics of Cloning," *Washington Post Magazine* (October 12, 1997); Rick Weiss, "Genetic Enhancements' Thorny Ethical Traits," *Washington Post* (October 12, 1997).

Brown Blues: Rethinking the Integrative Ideal

More than forty years have passed since the Supreme Court's *Brown v. Board of Education* decision, declaring unconstitutional state-imposed segregation of public schools. One would have thought that by now American society would have arrived at a consensus with respect to the substance and scope of *Brown*. The truth is otherwise. Even in the education sector of our national life that *Brown* specifically addressed, deep differences remain over what changes that decision was designed to effect.

Of course, opposition to *Brown* by whites committed to the maintenance of racial segregation in public education has been a daily reality from the moment the decision was announced. Over the years, that opposition has taken a variety of forms both simpleminded

Several developments in recent years suggest that growing numbers of blacks may be turning away from the integrative ideal.

and sophisticated. However, it was generally thought that one group, African Americans, was uniformly supportive of *Brown* and committed to its full implementation in education. After all, *Brown* was the culmination of a long campaign by the National Association for the Advancement of Colored People (NAACP) to overturn the "separate but equal" doctrine. It also ushered in, without doubt, more than a generation of court decisions and legislation that eradicated all vestiges of formal segregation in America.

Several developments in recent years suggest, however, that growing numbers of blacks may be turning away from the integrative ideal. Three examples of this shift are worth noting: first, black parents now express support for school board efforts to end desegregation plans that involve busing, favoring instead a return to neighborhood schools, even though this would result in increases in the number of virtually all-black schools in the inner city; second, at the urging of black parents, school boards in a number of major cities have attempted to create all-black male academies; third, black administrators, faculty, students, and alumni of historically black colleges in the South have joined

state officials in opposition to court-ordered higher-education desegregation plans. Some critics have dismissed these developments as perverse efforts to return to a "separate but equal" regime. In fact, these developments raise serious and complex questions about the future of race relations in America that deserve careful analysis, not simplistic characterization. This essay is an attempt to contribute constructively to that process.

Blacks and Neighborhood Schools

The school desegregation process has not been unproblematic, to say the least. More than forty years after *Brown*, there is still active litigation alleging constitutional violations. There is no gainsaying, however, that as a result of *Brown* and its progeny, thousands of black, white, and Hispanic children have been able to receive integrated educations and develop both educational and social skills that will stand them in good stead in later life. At the very least, the mandatory presence of white children has saved some black and other minority children from the physically inferior facilities—and inferior resources—to which they had been assigned under segregation.

Acknowledging the important gains of desegregation, however, should not blind us to the continuing legacy of segregation within desegregated systems. In many schools, racially segregated classes make it unlikely that children of different races will have meaningful interaction during the school day. Moreover, the black community has paid, in some instances, a high price for desegregation. For example, schools that served not only as educational institutions but also as community centers in predominantly black neighborhoods have been closed; black teachers and administrators have been dismissed and demoted disproportionately; and black students have encountered increased disciplinary action in recently desegregated schools. This record establishes, contrary to common assumptions, that desegregation has not been an unmitigated benefit to previously segregated black students and educators.

Meanwhile, demographic changes in the United States since 1954 have produced a pattern of residential segregation. This makes further progress in school

desegregation in certain areas difficult to envision. Urban centers across the nation are predominantly black and Hispanic; the suburbs and rural areas are predominantly white. Even in those cities where the white population exceeds the minority, the public school populations are predominantly black and Hispanic. This latter phenomenon can be explained by the presence of childless white couples, older white couples, and white families with children enrolled in private and parochial, rather than public, schools.

Although some litigation efforts to achieve metropolitan-wide desegregation have been successful, the Supreme Court's 1974 decision in a Detroit school desegregation case effectively limited the availability of that remedy in most urban areas. A few large cities have adopted voluntary desegregation plans involving urban and suburban communities, but their

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impact on inner-city segregation has been modest, largely because those participating in such programs have been disproportionately black. The result has been, therefore, a one-way rather than a two-way process, with urban blacks heading out to suburban schools but relatively few suburban whites coming into the city.

Some members of the black community have begun to question whether the result achieved is worth the time and expense that desegregation entails. There is also a sense among some blacks that in areas where desegregation plans no longer produce meaningful numbers of whites and blacks studying together, the plans are maintained because of the mistaken belief that blacks cannot learn unless whites are sitting next to them in class. The blacks who challenge the continuation of such plans argue that a return to neighborhood school assignment makes more sense because parental and community involvement in the schools would be more likely to increase. Moreover, governmental resources expended on busing could be redirected to improving the quality of materials and instruction available at those schools.

Blacks and whites who oppose efforts to roll back desegregation plans do so for a variety of reasons. First, they fear that such proposals are yet another attempt by school boards guilty of past intentional segregation to escape any further role in avoiding resegregation. Second, they suspect blacks who support such rollbacks of acting more in their own political and economic interests than in the interests of black children.

What rollback proponents seek, they say, are more and better jobs for black administrators and teachers in exchange for reduced pressure to increase or maintain desegregation levels. Third, rollback opponents fear that a return to all-black schools will result in "benign neglect" of those schools in terms of resources allocated for facilities, material, and personnel.

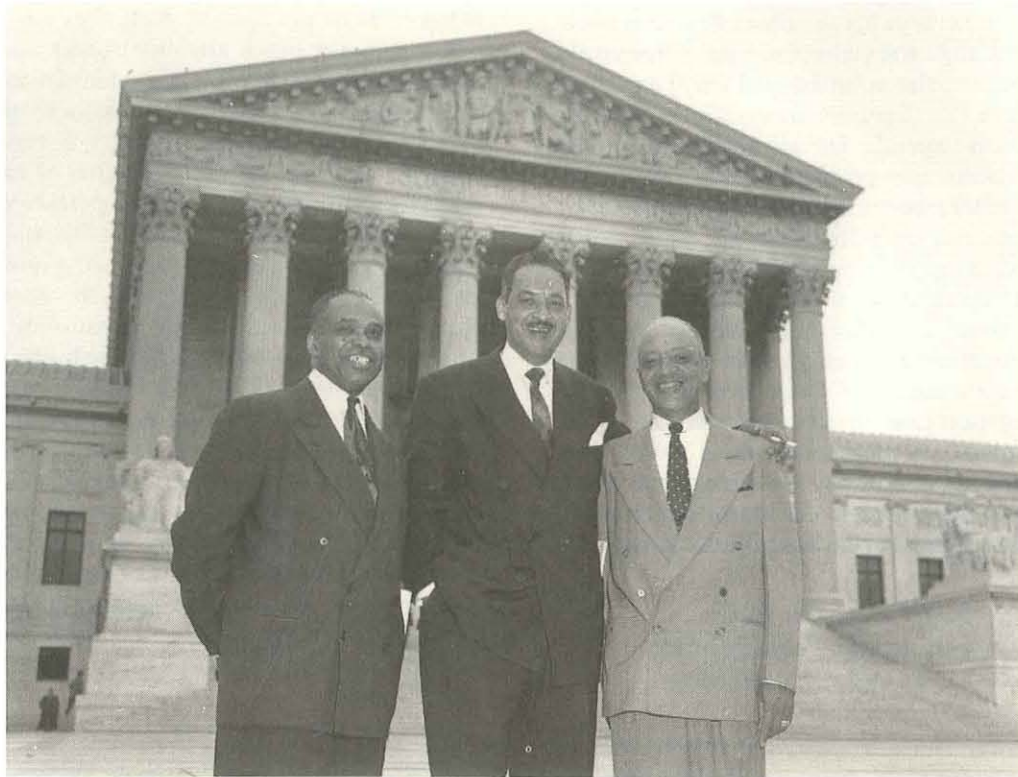
This debate, although perhaps the subject of greater media focus in recent years, is not a new one. Blacks, having seen the bad, along with the good, of desegregation, have for some time questioned whether the process should be extended to the limits that Supreme Court precedents allow. This attitude has been particularly prevalent with respect to desegregation plans that require extensive busing. These voices of restraint often had no effective forum, however. White school boards that expressed such views were correctly regarded as untrustworthy spokespersons on this issue. The major civil-rights organizations representing the plaintiffs in desegregation cases, on the other hand, strongly rejected—and continue to reject—any thought of stopping short of what the Constitution would permit.

The debate has taken on a new dimension, however, because black mayors, city council members, and school superintendents have begun to express concerns about the wisdom of what they see as "desegregation at any cost." Courts are justifiably perplexed

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over how to evaluate the views of this group because their authority, as elected and appointed blacks, to speak for the black community certainly is equal to, if not greater than, that of plaintiffs and their lawyers in school desegregation cases. Although some might dismiss their views as perversely malevolent toward black students, the positions of black elected and appointed officials deserve to be seen as expressions of concern about the most effective approach to educating black children under daunting circumstances.

For these and other reasons, blacks increasingly support efforts by school districts under court desegregation orders to return to neighborhood school arrangements, even though such modifications inevitably will return certain facilities in the black community to largely one-race status. Of course, we must not lose sight of the fact that constitutional rights are individual. Whether a school district has satisfied its responsibility under *Brown* and its progeny to dismantle a dual system is not subject to resolution by referendum. The



The three lawyers who prevailed in Brown celebrating before the U.S. Supreme Court Building on May 17, 1954. Left to right are: Washington lawyer George E. C. Hayes; Thurgood Marshall, special counsel for the NAACP; and James Nabrit, Jr., professor and attorney at law at Howard University. UPI/Corbis-Bettmann. Reprinted with permission.

difficult legal question is how we determine whether the dual system is still in place.

Many school boards insist that by removing the vestiges of their own segregative practices, they have satisfied constitutional requirements. Continued segregation, they argue, is not their fault but rather the consequence of residential segregation caused by private choice and market forces. Critics reply that schools have a duty to go on making adjustments until patterns of segregation have been eradicated. They take the position that the demographics cited to explain continued segregation are not adventitious but rather the result of mutually reinforcing segregative policies of school boards and other governmental agencies such as public housing authorities.

Under current Supreme Court doctrines, those who wish to modify desegregation plans are likely to prevail, because the Court consistently has refused to consider the extent to which segregative actions by governmental agencies other than school boards might justify maintenance of desegregation plans when modification would result in resegregation. Consequently, school desegregation plaintiffs are left with a wrong in search of a remedy. As they witness schools that were all black before desegregation return to that status once

the board's modifications go into effect, it must seem to them that years of effort have been in vain.

Schools for Black Males

Media attention and public debate over the past few years have also focused on proposals to establish public schools or programs exclusively for black male students. In Milwaukee, for example, the school board planned to designate two schools as all-black or virtually all-black facilities in which special attention would be given to the educational and developmental needs of black males. These "immersion schools" would offer features unavailable in other Milwaukee facilities: school days one hour longer and less rigidly structured than normal, a multicultural curriculum, and mandatory Saturday classes held in cooperation with the local branch of the Urban League. Weekend sessions would focus on nonacademic subjects, such as "what it means to be a responsible male," "how to save and invest money," and "the practicalities of cooking and cleaning." The students would also be required to wear uniforms.

As a result of actual or threatened litigation, Milwaukee's proposal and similar ones in other urban

school districts were modified to include female and white students who wished to participate. The legal and political debate continues, however. At the core of the controversy is the question of whether a school that admits only blacks is any more constitutional than the ones that *Brown* outlawed because they admitted only whites.

At one level, they clearly are not comparable. The system of state-imposed racial segregation in public education that *Brown* declared unconstitutional was designed to ensure that blacks remained a second-class, subjugated race in American society. Schools established for black males, in contrast, are not

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designed to subjugate whites or deny them first-class citizenship. Rather, they address what most people would acknowledge is the critical plight of young black males in urban America.

At another level, however, our history counsels us to be wary of *any* racial classifications. For that reason, the Supreme Court has mandated that any use of racial criteria by government must be for the purpose of achieving a compelling interest and must be necessary to achieve that purpose. Dual school systems under segregation failed that test because maintaining segregation of the races did not constitute a compelling governmental interest. All-black academies, in contrast, concededly are designed to meet a compelling interest—saving black males from educational and social disaster. However, the case has not been made persuasively that this is an interest that *necessarily* requires the exclusion of whites.

The fact that a school district might be able to achieve its goals more efficiently employing a racially exclusive approach is no justification for such a system. Expedience cannot legitimize racial segregation. Even taking the proponents of all-black academies at their word, there is little evidence to support the view that mentoring, counseling, extended school days, small classes, and a curriculum that gives proper recognition to the contributions of blacks to American society will improve black male educational and social functioning *only* in a racially segregated setting. Such an enriched educational environment is likely to produce positive results *irrespective* of the racial setting.

Proponents may contend that only experimentation will determine the effectiveness of such programs. Racial classifications, however, are not proper subjects for experimentation. Of course, in many urban

settings, the likelihood that whites will be enrolled in inner-city schools and thereby be displaced to accommodate the all-black academies is slim. Similarly, whites likely will not apply to attend such schools. Under these circumstances, as a practical matter, school districts can set up programs for all-black student bodies without imposing any bar to whites.

Proposals to create all-black academies have attracted adherents largely in inner-city districts (like those in Milwaukee) whose schools cannot feasibly be desegregated. Black parents and sympathetic school officials in these communities have joined forces to develop a structure that they hope will save black males. Such approaches clearly reflect disenchantment with the *Brown* integrative ideal and may be educationally misguided. However, to the extent that whites and females may participate, the programs would not appear to violate constitutional limits.

Historically Black Colleges and Universities

Lawyers for the NAACP prepared for their ultimate assault on the "separate but equal" doctrine in *Brown* by challenging successfully the exclusion of blacks from all-white graduate and professional schools. Indeed, it was in one of those earlier cases that the Supreme Court acknowledged the "intangible" inequality caused by segregation that would figure so prominently in its 1954 decision. The Court made clear shortly after *Brown II*, the desegregation implementation decision in 1955, that

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southern higher-education officials could not delay opening their institutions by invoking the "all deliberate speed" doctrine. Consequently, efforts by blacks to enroll in previously all-white colleges and universities during the late 1950s and early 1960s found support in the courts, as well as in the executive branch. In a few instances, the government even called out troops to ensure the admission of blacks.

Meanwhile, almost no attention was being given to the fact that southern and border states were continuing to operate dual systems of higher education. This arrangement was dictated, in large part, by the federal government's promotion in 1862, under the First Morrill Act, of state land-grant colleges for whites and then in 1890, under the Second Morrill Act, parallel institutions for blacks. Thereafter states systematically discriminated against black institutions in the

allocation of funds for a period that extended well beyond 1954.

The historically black institutions, as a group, nevertheless achieved remarkable success educating students from segregated and inferior secondary schools. They developed programs that provided their students with instruction and nurturing sufficient to prepare them to function effectively in society after graduation. In many cases, their graduates have pursued graduate and professional training at prestigious universities in the North and West.

Black higher-education groups were at odds with federal agencies and the NAACP regarding the wisdom of pressing desegregation of public colleges and universities.

Early attempts to challenge dual systems of higher education produced court orders that seemed to embrace a "freedom of choice" approach. State officials successfully argued that college students were not assigned to institutions but rather were free to select a college or university based on considerations of curriculum, location, cost, and admissions requirements. Consequently, as long as states did not preclude students from attending an institution because of their race, the courts determined that dual systems did not offend the Constitution.

In the early 1970s, however, black plaintiffs initiated litigation in *Adams v. Richardson*, charging federal officials with illegally providing funds to states that maintained dual systems of higher education. As a result of this suit, the court ordered the Department of Health, Education and Welfare (HEW)—and later the Department of Education—to launch an enforcement campaign to dismantle those systems. Central to that campaign was the premise that the states in question had a constitutional duty to remedy the conditions that created and perpetuated separate black and white institutions at the postsecondary level.

Black higher-education groups were at odds with federal agencies and the NAACP Legal Defense and Educational Fund, which brought the *Adams* suit, regarding the wisdom of pressing desegregation of public colleges and universities. Black college presidents, faculty, and alumni were undoubtedly mindful of the burdens the black community had been forced to bear during desegregation of public primary and secondary systems. They feared that desegregation of higher education would result, at best, in whites displacing black teachers and administrators, as well as black students. At worst, given the relative inferiority of their institutions, desegregation might result in the

closing of schools or the absorption of traditionally black institutions into historically white schools. In either event, institutions important to the black community would lose their identity, and opportunities in higher education for black administrators, faculty, and students would be significantly diminished.

Despite similar concerns, however, proponents of desegregation in higher education believed that both litigation and administrative enforcement could increase resources available to historically black institutions. Reducing program duplication and forcing states to locate especially attractive academic programs at traditionally black schools would also enhance the schools' long-term viability.

It is fair to say that this desegregation effort has not been very successful. Significant segregation between historically black and white institutions is still apparent. Since 1973, state officials have effectively utilized the administrative process to delay meaningful change. Ultimately, the Court of Appeals for the District of Columbia Circuit dismissed the *Adams* litigation on technical grounds, thus allowing the federal government to decide on the nature, scope, and timing of enforcement largely free of court oversight.

In 1992, however, a case involving the Justice Department and the state of Mississippi presented the Supreme Court with an opportunity to define a state's constitutional duty to dismantle formerly dual systems of higher education. Some lower federal courts had taken the position that higher-education authorities had an affirmative responsibility, similar to that imposed on school boards in the case of primary and secondary school desegregation, to eradicate the vestiges of their dual systems. These courts believed that this responsibility must be discharged by addressing a variety of practices that affect students' decisions about which institutions they attend, such as admissions standards, program duplication, institutional resources, and governance. Other courts, as we have seen, rejected the notion that primary and secondary school desegregation doctrines had any applicability to higher education, principally because college and university attendance is not mandated by the state but depends on individual student choice. Consequently, these courts—including the trial court that heard the Mississippi case and the Fifth Circuit Court of Appeals—concluded that a state's constitutional responsibility ends once the state has removed all racial bars to students' attending the college or university of their choice.

In *United States v. Fordice*, the Supreme Court essentially embraced the former "affirmative duty" doctrine and reversed the lower courts' determination that Mississippi had met its constitutional responsibility. The Court found that in at least four areas—admissions standards, program duplication, institutional

mission assignments, and continued operation of all eight public universities—the state had failed to show that the “policies and practices traceable to its prior system that continue to have segregative effects” had “sound educational justification” and could not “be practicably eliminated.” The case was then returned to the lower courts for evaluation of the Mississippi system against the Court’s newly articulated standard.

The Court’s decision left in limbo, however, the future of Mississippi’s three historically black institutions. Although the Court acknowledged that “closure of one or more institutions would decrease the discriminatory effects of the present system,” it declined to find such action constitutionally required. However, it flatly rejected the notion that Mississippi had a constitutional duty to upgrade the historically black institutions, as such. Rather, it left to the lower courts the question of whether “an increase in funding is necessary to achieve a full dismantlement.” Given this ambiguity, the possibility exists that Mississippi will be able to achieve a unitary higher-education system by closing those institutions.

Disproportionate Burdens

It is this fear that black institutions will be the inevitable casualties of higher-education desegregation that has complicated the dismantling of dual systems. Take, for example, the ostensibly odd alignment of parties in a case from Louisiana. After concluding that Louisiana’s desegregation plans were inadequate, the federal court commissioned its own strategy. That plan envisioned, among other things, merging the traditionally black Southern University Law Center into the law school of Louisiana State University (LSU), the state’s traditionally white flagship institution. The two law schools are located in Baton Rouge, only a few miles apart.

That the state opposed the merger plan was not surprising. However, it was joined by the Southern University Board of Supervisors, which viewed the court’s order as a step backward, rather than forward, for black education in Louisiana. The board claimed that blacks, the victims of the state’s history of segregation and discrimination in higher education, were being required to bear a disproportionate burden in rectifying that situation. Specifically, the board contended that the merger of Southern University’s law school with LSU’s would undoubtedly displace black faculty and staff and curtail opportunities for blacks seeking legal education. The court’s plan did not envision LSU’s absorbing Southern University’s faculty and staff, nor did it require LSU to expand to insure against a net loss of law school seats for black students after the merger.

In defense of its plan, the court took the position that the merger was required by the Constitution and

Redefining Equality

Neal Devins and Davison M. Douglas,
editors

The idea of equality is central to American civic life and one of the foundations of our national identity, yet there is little consensus on the meaning of the term. Charges of unequal treatment continue to be voiced nationwide, in both public discourse and in the courts, and competing views of equality have erupted into a cultural conflict that looms large in contemporary American politics.

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was in the long-term interests of the citizens of Louisiana, black and white. But for the state's creation and maintenance of segregated higher education, the court pointed out, there would not still be two public law schools in the same city, one white and the other black. The court concluded that desegregation could occur only if one of the institutions closed. Moreover, the court observed that in a fiscally strapped state, maintaining two law schools in Baton Rouge made no economic sense.

Southern University's law school had been denied adequate state support because of its status as a black institution. The condition of its physical plant and the

*Any solution must operate
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quality of its educational program were, as a result, inferior to those of LSU. Consequently, the court concluded that Southern University's law school should be the one to close. In response to the Southern University Board of Supervisors' concerns about the desegregation process, the court suggested that the board was interested in protecting the jobs of Southern University faculty and administrators rather than in improving educational opportunities for blacks.

This controversy delineates starkly the dilemma confronting proponents of higher-education desegregation. The court clearly was correct that the maintenance of dual, segregated law schools in one city makes no legal or fiscal sense and that merging the institutions would require blacks and whites to study law together rather than apart. But the black opponents of the merger also have compelling arguments. Absent the state's history of discriminatory treatment of Southern University Law Center, the school's facilities and program probably would not be so inferior to those of LSU. Had there been "tangible" equality over the years between the two institutions, white students might have opted to attend Southern University rather than LSU based on "intangible" considerations, such as the presence of particular faculty members or curricular emphases. Moreover, there is no reason why Southern University's board should apologize for seeking to protect the jobs of faculty and administrators. They, too, are victims of the state's segregative practices.

Finally, Southern University Law Center and LSU Law School have different admissions criteria. As a consequence, Southern University has been able to admit some black students who, based on objective indicators such as grade-point average and Law

School Admission Test scores, would not be competitive candidates at LSU. Southern University, nevertheless, has been able to train and graduate generations of black lawyers who provide competent legal services to poor and minority communities in the state. Unless LSU ensured that black students whom Southern University would have admitted would find seats at LSU, the merger would represent a net loss of educational opportunities for black students in Louisiana.

The Louisiana case eventually was dismissed in light of the Fifth Circuit's ruling in the Mississippi case. Solving the dilemma in Louisiana and in other states where higher-education desegregation is under way will not be easy now that the Supreme Court has vacated that decision. Any solution must operate within the twin constraints of constitutional requirements and economic reality. At the same time, it must address responsibly the displacement effects of the desegregation process and the ironic price that the black community must pay for desegregation.

Conclusion

The *Brown* decision and the integrative ideal that it embraced have opened opportunities for black advancement that were previously unthinkable. *Brown* also transformed our entire society in other ways too numerous to mention. As the developments discussed above suggest, however, the increasing racial polarization and residential segregation in America have put the integrative ideal to the test. Concerns about the burdens blacks have had to carry in the desegregation process, and the seemingly intractable problems presented for largely black school systems in educational *extremis*, are causing growing numbers of blacks to rethink *Brown's* integrative ideal. These are admittedly difficult questions. Nevertheless, they deserve to be asked—indeed, they cannot be avoided. They must also be answered, although the answers may be uncomfortable and disappointing, at least in the short run, for those of us who hoped that we would see a different America forty years after *Brown*.

—Drew S. Days, III

Drew S. Days, III, is Alfred M. Rankin Professor at Yale Law School. This essay has been adapted from his chapter in *Redefining Equality*, edited by Neal Devins and Davison M. Douglas, copyright 1998 by Oxford University Press. Published by arrangement with Oxford University Press, New York.

Preserving the Watermen's Way of Life

The town of Solomons, on the western shore of the Chesapeake Bay in Calvert County, Md., was once the center of a flourishing community based on commercial fishing and boat-building. Over the last thirty years, however, development has greatly altered the structure of the region's economy. An influx of suburbanites who live in the county and commute to jobs in Baltimore, Annapolis, and Washington, D.C. has driven up prices and created a "conflict of cultures" between new residents and old. Pollution has contributed to a decline in the productivity of the Bay and its tributaries, forcing many watermen out of business. In the words of one old-time fisherman, the heart of a "real watertown" has been converted into "two blocks of nothing but solid junk shops." Today, there are probably fewer than twenty working watermen in Calvert County.

On Maryland's Eastern Shore, small-scale commercial fishing is still viable and watertowns are, relatively speaking, intact. Most of the Eastern Shore is too far from major metropolitan areas to be transformed into the next suburban frontier. Yet the region faces intense development pressures, from second-home construction and recreational tourism, at a time when many of the traditional uses of the land and the Bay have become less viable economically. As one waterman predicted, "We're going the way of the whaling fleets of North America."

Americans are used to paying bittersweet homage to occupations rendered obsolete by advancing technology and changing tastes. But while communities sometimes rally to keep the last shoeshine men or arabbers

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in business, such efforts are usually ad hoc attempts to hold onto a dying past a little longer, and rarely the harbinger of a deliberate policy of preservation.

Similarly, Americans cherish their rural land- and seascapes, yet until recently they have surrendered them to the onslaught of progress and development. Unlike magnificent and supposedly "pristine" natural areas, such as the Grand Canyon and Yosemite Valley,

farmland and coastal fisheries were not set aside in preserves. While local communities would often resist the loss of farms or working harbors to subdivisions or waterfront condos, these protests, too, had an ad hoc character; in the absence of any principled basis for preservation, they appeared to be little more than futile, self-interested pleas to be spared from the development that was occurring everywhere else.

Over the past two decades, however, the environmental movement has come to recognize that some rural landscapes, especially farmland, have a beauty and harmony distinct from, but not inferior to, that of wilderness areas (the historic focus of preservation efforts). At the same time, environmentalists have developed a new appreciation for rural vocations. Such vocations are instrumentally valuable in protecting landscapes that bear the stamp of human habitation; there may be no more effective way to preserve open space in developing areas than to preserve farming. Just as influential, though perhaps less explicitly, is a belief that these vocations are intrinsically valuable, an inherent part of the landscape which environmentalists seek to preserve. If tilled fields and terraced hillsides have significant aesthetic, cultural, and moral value, so do the activities of tilling, planting, and harvesting.

Several jurisdictions, including Maryland, have recently adopted a host of legal and regulatory mechanisms, many borrowed from Great Britain, to protect farmers' holdings and thus preserve the rural landscape. Under Smart Growth and Rural Legacy legislation, the state attempts to slow development in rural areas and redirect it to older urban and suburban areas. These laws empower state and local authorities to purchase conservation easements from farmers and allow third parties to purchase farmers' development rights for use elsewhere. In both cases, the laws limit the subdivision of farmland while providing capital for farming operations.

Smart Growth and Rural Legacy policies have not yet been directed toward watermen. In part, this is because the watermen's relationship with valued environments is more ambiguous and complex than that of farmers. What constitutes a waterman's holding? The stretch of the Bay or the tributary he uses most frequently? His boats, rigging, traps, and docks? His share of watertown life and community? All three seem necessary to maintain watermen on the Bay, but

it isn't clear which of these can or should be the focus of preservation efforts. Moreover, watermen cannot be made into conservators of the rural landscape by the same means as farmers. For example, watermen rarely have land or other real property that is coveted by developers—assets that can be preserved by easements or transferred development rights.

The new policies seek to maintain rural livelihoods not for their economic yield, but for the way of life they represent.

The watermen's work has long been subject to a regulatory regime, but one with a very different orientation. These regulations are informed by a conservationist ethic that seeks to maintain natural resources for human sustenance and convenience; their goal is to enhance the long-term productivity of watermen through limits on their catch size and fishing seasons. (Many watermen have, perhaps shortsightedly, opposed such regulations.) The new policies, in contrast, express a preservationist ethic: they seek to maintain rural livelihoods not for their economic yield, but for the way of life they represent.

Although these policies haven't yet been adapted to commercial fishing, there is a growing recognition that the watermen's livelihood is an integral part of what is worth preserving in America's coastal areas. "To me," writes Bill Goldsborough, the principal fisheries scientist from the Chesapeake Bay Foundation, "one of the main reasons that you want to save the Bay is to maintain the watermen's culture, the watermen's way of life. . . . Without them, if you just imagine Chesapeake Bay without any commercial fishing activity, it's really kind of a sterile body of water." In much the same spirit, Tom Horton worries that "much faster, and more irreversibly than we are losing our water quality on the Chesapeake, we are losing our human diversity."

Horton's remark suggests another source of the impulse to preserve traditional livelihoods: a concern for diversity that encompasses watermen as much as farmers. The lives and work of watermen would seem to possess several qualities that have become increasingly rare in post-industrial America: an intimate involvement with the natural features of the landscape, a direct connection between work and sustenance, and a high degree of personal autonomy. If, however, we seek to preserve commercial fishing for the sake of human diversity, we need to examine whether the watermen really do possess a distinctive culture, or whether the portrait of watermen as hardy, self-reliant subsistence workers is merely a romantic

anachronism. We must ask, too, whether any qualities and attitudes that set the watermen apart are likely to conflict with a preservationist agenda. It may be that the relevant tools of public policy are ones that the watermen themselves are reluctant to employ even for their own apparent benefit, or that policies intended to sustain the watermen's culture would in fact subvert it.

This essay offers a sketch of some of the values and experiences that appear central to the watermen's self-conception, drawing on recent interviews and focus-group meetings in Calvert and St. Mary's Counties. Its purpose is to provide some understanding of how the watermen see themselves, what they cherish in their work, and how they understand the forces that threaten it. Combining ethnography with environmental ethics, we have tried to see whether the differences in perspective and lifestyle between watermen and the dominant culture are really as large, and as important,

It may be that policies intended to sustain the watermen's culture would in fact subvert it.

as one might suppose, and whether certain legislative and regulatory strategies are appropriate for preserving what is truly distinctive in their way of life.

Nature and Human Activity

It is their interactions with nature that would seem most likely to distinguish the watermen from their new neighbors and, more generally, from those in the economic mainstream of late twentieth-century America. Watermen on the Chesapeake typically begin their involvement with the Bay and the shoreside environment at a very early age. Many of their earliest memories have to do with the past abundance of various fish species in the Bay, and the clarity of the water before the effects of pollution began to be felt in the 1960s. Fishing for both profit and food was much easier then; children could take part and keep some or all of the money they earned. (From the watermen's point of view, the children of newcomers to the Chesapeake region seem strangely disconnected from the adult world—unable to share in the work that their parents do, and acquainted hardly at all with the life of the Bay.)

The sources of value in the watermen's work and memories are not limited to the material gain they enjoyed from their fishing activities, nor to the romantic experience of communing with nature. Instead, the watermen's scheme of valuation combines the two. One of the men we met remembers seeing so many eels on a river bottom "that they look[ed]



Photograph by Michael W. Fincham. Reprinted courtesy of Maryland Sea Grant.

like wheat grass in the field out there." With equal acuity, another recalls rising at four in the morning to catch the eels, which were then shipped to Baltimore in "great big giant wooden barrels." Aesthetic and practical interests are unself-consciously conjoined. Similarly, when the watermen talk of the simple beauty of caught fish and shellfish, tied into this beauty is their knowledge that the catch is valuable.

While acknowledging the physical demands of their vocation, the watermen also express an appreciation for the peace and quiet of work on the Bay. These aesthetic satisfactions of fishing are closely linked to the independence of the job; as one focus-group member explained, "You have nobody there with a hatchet over your head, telling you when you've got to do this, when you've got to do that." Nor is one bothered by co-workers "whining" that they aren't paid enough for their labor. Instead, there is a shared understanding that the harder a waterman works, the more he earns: "Look, you swing these shafts, or you pull that net a little bit harder, and you'll make a little bit more money." A fishing party that catches some bluefish can "see the gains right there."

Speaking more abstractly, we can say that the watermen make little distinction between beauty and utility, or even between nature and human activity. They value the Bay not only as a source of bounty and delight, but also as a source of independence; its beauty

is closely linked with their own sense of autonomy and agency as they wrest their living from it. Many environmentalists also value interaction with nature, but they tend to see themselves as respectful outsiders, venturing into alien territory and leaving nothing but footprints. The watermen are considerably more familiar, and less constrained. Yet they are never guilty of seeing the Bay merely as an exploitable resource.

Vernacular Libertarianism

For all their concern about new threats to their way of life, the watermen are reluctant even to discuss policies to control development and in-migration. They cherish their own freedom and are reluctant to consider government restrictions on individual economic activity (although they often accept *social* restrictions on other individual activities—for example, on the amount of time spent each day fishing, on children's behavior, or, on Smith Island, on drinking in some settings.) This deep libertarian streak makes watermen suspicious of government intervention of any kind. They regard government oversight as a "hatchet" which they are reluctant to wield against anyone else, even those whose affluence and greed threaten their survival. Americans are often libertarian when it comes to their own liberty interests; what is striking about the watermen is the consistency with which they apply their philosophy.

**Saving the Seas:
Values, Scientists, and International
Governance**

**L. Anatheia Brooks and
Stacy D. VanDeveer, editors**

Saving the Seas is a collection of eighteen essays by leading thinkers in the area of marine and environmental management. The contributors focus on the world's coastal seas, where stakeholders compete for intensely sought-after resources—not only fisheries, harbors, shipping and defense infrastructure, but also culturally important places and traditional ways of life.

Saving the Seas resulted from a convening of scientists, citizens, and management experts under the banner of EMECS—the Environmental Management of Enclosed Coastal Seas—at international meetings held in Kobe, Japan, and Baltimore, Maryland. The publisher, Maryland Sea Grant, is a member of the Coastal and Environmental Policy Program at the University of Maryland.

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This vernacular libertarianism is reinforced by a strong fatalism, which sees both the decline of the fisheries and the spread of development as inevitable. "There's a lot of stuff you can't do nothing about," one waterman explained. Development "is just like a big shark. . . . It's got a big mouth on it and it just keeps eating up anybody in its way." In general, the watermen do not perceive development as a direct or indirect effect of government policy; they do not recognize the state's hand in the proliferation of new homes on the land and leisure craft on the water. Thus, they tend to view curbs on development as a simple denial of access to the Bay, which they oppose, rather than as an

*Each of the watermen is intensely
aware of his relative standing
in his own community.*

effort to undo or redress the effects of past government intervention on behalf of development, which they might find easier to accept. In their view, restricting the influx of tourists and migrants would not only be unfair, but futile as well.

Historically, there is one threat—pollution—against which the watermen have been willing to support regulation. Tom Horton notes that in the 1880s, during their industry's prime, Chesapeake oystermen used their political clout to force Baltimore to construct the nation's most modern sewage treatment plant to protect water quality in the Bay. Today, however, less and less of the Bay's pollution comes from point sources like the Baltimore municipal sewer system, more and more from the sediment and chemical run-off of an increasingly developed, impermeable watershed. But while the watermen clearly recognize the connection between development and pollution, they do not seize on that connection to justify restrictions on the former.

Status and Authenticity

Each of the watermen we met was intensely aware of his relative standing in his own community. Status comes with age and experience and long residence in the place one was born to. A tone of formality and mutual respect pervades their conversations; for instance, absent or deceased watermen are often referred to as "captain," the title given by watermen to the working owner of a fishing vessel. In a gathering of watermen from a county such as St. Mary's, all the participants know each other well. In speaking of difficult issues, they look to one another for support and confirmation.

In the communities of the Chesapeake, there is a clear sense of what it means to be a "real" waterman. In conversation, the men are exceedingly careful in describing their lineage and work experience, always mentioning any feature of their history that might qualify their right to the title of waterman. (One focus-group participant had migrated to the area as a young man, and so couldn't claim a familial tie to the trade; another had grown up on a farm.) Although at least two of the men had been to college, neither touched on that part of his life, except once in passing.

To be sure, being a genuine waterman isn't the only path to status and respect. The oldest participant in the group had "taken to the shipyards" in his youth and become a master carver. At times he sounded apologetic about this, admitting that he had never had the physical stamina for life on the water. But he also made sure to mention that he had operated a charter boat for two summers and thus "got to know what the Bay was all about." The other members deferred to him and acknowledged his seniority in their community. Another participant, the one with the widest experience of the world outside the Bay, gave a full account of his working life, as if to establish his authority to speak on various matters. He became the unofficial leader of the group, and the majority of questions and comments by the other watermen were directed to him.

The watermen's notions of status and authenticity help to explain why they are so offended at the assertiveness of wealthy professionals who have moved into the Bay region. For example, in the live-and-let-live watertown economy of the past, the untidiness of commercial fishing operations troubled no one. The nets and rusty gear that lay around the

power to impose their ideas of rurality on the watermen and their operations violates a traditional understanding of how authority is acquired and exercised in these communities.

The Preservationist Challenge

This sketch of the watermen's lifestyle and self-understanding suggests that their culture is indeed distinctive. But it also suggests that their culture is highly vulnerable, and that the very qualities that set it apart may also make it resistant to preservationist strategies.

Preserving livelihoods is a more complicated business than preserving natural landscapes. Ecologists have long cautioned that even the simplest interventions in nature have complex and often unanticipated effects. The complexity and uncertainty are greater when the object of preservation is a human activity. The agents may not accept the preservationists' means or share their values; alternatively, the very attempt at preservation may transform the character of their work in ways inconsistent with what they value in it.

We have noted that the watermen are reluctant even to discuss, let alone request, government restrictions on the kind of development they see as threatening their way of life. Admittedly, their cooperation would not be necessary to impose limits on development. But a culture that values personal freedom so highly might be compromised if it were heavily dependent on coercive state action for its survival.

Subsidies may be even more subversive than restrictions. Many watermen understand the worth of their vocation as inhering in their confrontation with the hardships and caprices of nature; its beauty and dignity lie in the watermen's struggle to sustain themselves and their families from the life forms around them. As we have seen, the aesthetic satisfactions of their work are conjoined with a sense of the immediate benefits they derive from the Bay. A program of subsidies would attenuate the connection between nature and subsistence. The result might be what Erving Goffman calls the "keying" of an activity from one frame to another—from natural to social, from hunting-gathering to performance. A waterman kept in business by protectors of his vocation may be doing something of value, but he is no longer wresting a living from the sea.

Some environmental ethicists argue that the very decision to preserve or designate a wilderness area renders it an artifact. This seems a bit overstated—after all, the rocks and rivers go about their business despite the designation, and so do the animals, as long as the tourists resist feeding them. But preserving a community's way of life is a different matter, and the claim that the act of preservation is self-defeating seems far

To the "real" watermen, the newcomers' sense of what is worth preserving is hopelessly sanitized and inauthentic.

yards and landings were taken for granted; so was the noise of boats and trucks starting up in the early morning. But the newcomers often arrive with the expectation that they have purchased a kind of idyllic rural serenity, and complain to local authorities when this is diminished. They may also expect to catch oysters and crabs for recreation, and blame local watermen for "overfishing"—a phrase the watermen detest—when these are found to be scarce. Some of the new residents may actually be motivated by a kind of preservationist sentiment. But to the "real" watermen, the newcomers' sense of what is worth preserving is hopelessly sanitized and inauthentic. Moreover, the fact that some new residents have rapidly gained sufficient political

more plausible for culture than for nature. When the state keeps watermen in business because it values their activity rather than their catch, those watermen are no longer working for themselves or their customers, but for a broader public.

Of course, any new policies would seek to keep farmers and watermen in business as producers, not performers. But if a dwindling proportion of their income actually comes from the sale of crops or catch, and if the purpose of the subsidies that make up the difference is not to yield larger harvests or catches but

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to maintain the activity of farming or fishing, then the transformation from producer to performer may be inevitable. The farmers and millers at restored "colonial" villages may actually sell their products to tourists, but they do not make a living from those sales. A person paid to engage in a traditional activity that can no longer be justified in economic terms, by a society that values the activity itself, has arguably become a reenactor, even if it is his own past life he is reenacting. Given the watermen's intense concern with authenticity, such a performance might seem particularly demeaning.

Yet the transformation of watermen into performers has already begun without direct state intervention to preserve their communities and livelihoods. Although the watermen speak of themselves as a dying breed, insisting that they would rather move on or retire than change their way of living, they have adapted to new circumstances. One waterman we met has turned his skipjack into a floating classroom; others crew on charter boats. In one respect, this transformation is encouraging. It will keep some of the more enterprising watermen on the Bay, whatever the state of the fishery or the local economy. Moreover, the transformation of watermen into educators may well give future generations a deeper appreciation of their natural and social history than they would otherwise have. But museum talks and educational boat trips offer no opportunity for the kind of grueling, exhilarating encounters with nature that have enriched the watermen's own lives.

Some might draw a harsher conclusion—that the preservation of watermen on these terms would be a fraud, an historical-restoration-without-walls that owed much of its appeal to ignorance or self-deception about what the watermen were actually up to. It may show more respect for the watermen to let them die

out, as they often threaten to do; a living memorial may be less dignified.

Perhaps, however, there are less subversive ways of preserving the livelihoods of watermen, ways that would maintain the connection to hunting and gathering on which the integrity of their work depends. Price supports for local fish harvested by traditional methods might well offend the watermen's sense of independence, but by placing added value directly on the catch, they might preserve the character of the watermen's work as resource extraction, while evincing a social recognition of its dignity and worth. Perhaps the state could also support the watermen less directly, by promoting the kind of consumer demand for traditionally produced local products that has created a cottage industry in organic and boutique farming. This demand could be met by a new generation of "craft" fishermen whose catch would be sold at premium prices at upscale markets. While the demand for the local may express a patronizing enthusiasm for the yield of an idealized rural economy, it might sustain some watermen in their traditional vocations without the heavy hand of direct government subsidy.

Finally, greater efforts at pollution control offer the possibility of enhancing the productivity of the Chesapeake Bay and of restoring some of the abundance that figured so prominently in the watermen's attachment to the environment of their youth. Such a policy would advance the conservationist tradition while addressing more recent preservationist concerns. Environmental protection—the end that was to be served by maintaining rural vocations—would itself become a means of keeping those vocations alive.

—David Wasserman and Mick Womersley

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Negotiating Jerusalem

Of all the final-status issues to be dealt with by Israeli and Palestinian negotiators, there is none as difficult as Jerusalem. The Palestinians claim East Jerusalem as the future capital of a Palestinian state; the Israelis maintain that they alone will remain sovereign over the city. Moreover, these do not appear to be mere negotiating positions. The claims asserted by the PLO and the government of Israel are expressions of attachments that are rooted in the aspirations, identifications, and self-understandings of the two peoples.

For Jews, having Jerusalem is symbolic of the entire project of "return." When ancient Israel was conquered by the Babylonians, it was from Jerusalem that Israelites were taken into captivity. When they came back from exile in 538 BCE, their paramount task was to rebuild the Temple that Solomon had built. When the Israelites revolted against the Romans in the first century CE, it was Jerusalem that was the fortress of resistance. And when the Romans finally defeated them, the symbol of that defeat was again the destruction of the Temple. Following a second revolt, the city itself was rebuilt and renamed as a Roman city, Aelia Capitolina, from which Jews were barred. And when the Roman Empire adopted Christianity, Christian hostility toward Judaism was expressed through strict adherence to the ban forbidding Jews to live in Jerusalem. The return to Jerusalem has been throughout the centuries the central symbol of the attainment of Jewish self-determination. It is toward Jerusalem that religious Jews pray. It is Jerusalem that is mentioned three times a day in those prayers, and it is with the words "Next year in Jerusalem" that Jews the world over have concluded the Passover seder.

To Muslims, however, Jerusalem is an Islamic city. For most of the history of Islam, Jerusalem has had a predominantly Muslim population, and it has been under Islamic rule for most of the thirteen centuries since the Christian Patriarch surrendered the city to the Caliph Umar in 638 CE. The primary exceptions were the twelfth century, during the ninety years of Crusader rule, and the twentieth century, especially the post-1967 period. It is to Jerusalem that Mohammed is said to have been transported, and from the rock beneath the Dome of the Rock on the Temple Mount that he is said to have ascended to Heaven to receive his final revelation. While less significant to Muslims as a whole than Mecca and Medina, Jerusalem surely is the most important city for Palestinians, be they Muslim or Christian.

Within it live 1 in 8 Palestinians in the West Bank. Geographically central, Jerusalem is the heart of their educational, religious, and cultural life.

Whose Jerusalem is it rightfully? This is an area of moral indeterminacy. Even if there were agreement on all the facts (itself highly unlikely), there are no widely shared moral principles which would be sufficient to assess the relative merit of the two claims.

Religious Jews believe in a covenant by which the land was given to Abraham's descendants through Isaac. What weight are we to grant to these beliefs? Even if one dismisses as religious mythology any

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notion of god-giveness with respect to the land, the fact remains that for thousands of years people have understood their relation to the land in these terms. Muslims, on the other hand, dispute the centrality of the Abraham-Isaac relationship and instead emphasize Abraham's relationship to his first son, Ishmael, from whom they see themselves as descended. Moreover, Palestinians also claim to be descended from the Jebusites, the pre-Israelite inhabitants of Jerusalem. How are we to judge between them?

Religion aside, what importance do we assign to the sheer fact of possession of the land and to issues of dispossession? Does it matter who possessed the land first? How does the passage of time strengthen or erode a people's claims to ownership? How much significance do we give to the dominant Muslim presence in Jerusalem for most of the last 1,200 years, or to the existence of a Jewish majority within the Old City for a significant part of the last century, or to that of a Muslim majority within the Old City for the last fifty years? The unanswerable questions go on and on.

Moral Recognitions as Motivation

Given that the achievement of moral agreement is a hopeless quest, there is a general tendency among those working for peace to put aside moral issues and to focus instead on arguments of national interest for

both Israelis and Palestinians, hoping to convince both sides that it is in their interest to compromise. Thus, the Israeli peace movement almost always couches its arguments in terms of Israel's interest in achieving peace and security. Only rarely does it raise the issue of Palestinian rights. And if anything, this same pattern is more dominant among Palestinian moderates.

However, those seeking to promote a willingness to compromise may have reached exactly the wrong conclusion from the futility of efforts to assess who has the stronger claim to Jerusalem. The complexity of the issue, and the absence of settled principles for resolving it, actually point to one conclusion that could emerge as a widely held proposition for both Israelis and Palestinians: namely, that the other side has *some* legitimate rights with regard to the city.

Once said, of course, this proposition appears obviously true to most outside observers, but of little import. First, it is believed that among those actually

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engaged in the conflict, only the peaceniks would agree that the other side has any rights to Jerusalem. Second, it is widely doubted that such recognition carries with it any substantial motivation to compromise. An individual's intellectual recognition of the rights of another people tends to be viewed as an epiphenomenon when it conflicts with the rights and interests of his own people.

Yet recent studies of Israelis and Palestinians suggest that this "realist" vision is wrong on both counts. For instance, 39 percent of Israeli Jews answered affirmatively when asked, "In your opinion, do the Palestinians have any sort of legitimate rights with regard to Jerusalem?" Among those who identify with the Labor Party, the figure rises to 55 percent. Some recognition of Palestinian rights with regard to Jerusalem was also affirmed by 27 percent of those who belong to the Likud Party, and by more than 20 percent of those who identify with the far-right parties. Among those Israeli Jews who believe that Palestinians have some rights to Jerusalem, 41 percent belong to the right or far-right parties. So it is not the case that only peaceniks can see some validity in the claims of the other side.

A stranger to Israeli politics might draw a discouraging lesson from these findings. Since many Israeli Jews who acknowledge some legitimate Palestinian rights with regard to Jerusalem nonetheless vote for Likud, one might conclude that moral recognition does not

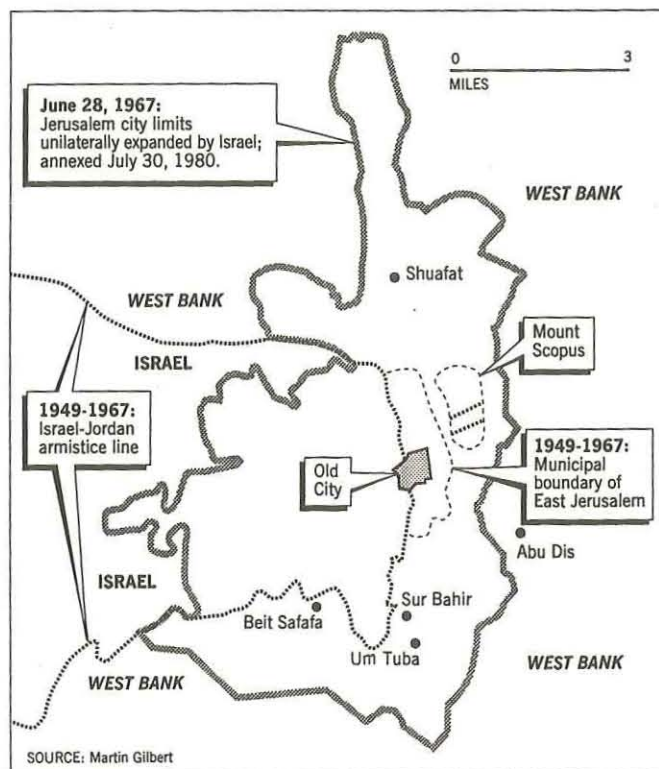
affect willingness to compromise. But this would be a mistake. People identify with Israeli political parties for many reasons, some having little to do with the Israeli-Palestinian conflict. Moreover, supporters of Likud are not necessarily averse to compromise. For instance, 35 percent are willing to seriously consider Palestinian sovereignty over peripheral areas of Jerusalem such as Um Tuba and Sur Bahir (see map), and 26 percent would seriously consider joint administration of the Old City, provided that Israel did not yield its claim to sovereignty.

To ascertain the motivational force of believing that Palestinians have some legitimate rights with regard to Jerusalem, one recent study divided Israeli Jews into four groups, depending on their views as to a) whether Palestinians have any legitimate rights with regard to Jerusalem and b) whether a peace agreement with the Palestinians will lead to long-term peace. (See the table on page 25.) The first group takes a positive view of both questions; the fourth group, a negative view of both questions. As one might expect, the first group is very open to various compromise proposals, while the fourth group is strongly opposed to compromise. Our interest lies mainly in the two other groups: those who believe that Palestinians have rights but don't believe real peace is possible even if a peace treaty is signed, and those who believe real peace is possible but don't believe Palestinians have any legitimate rights with regard to Jerusalem.

If it were true, as realists assert, that recognition of another people's rights is little more than a motivational epiphenomenon, then one would expect to find

*Recognition of the other side's
legitimate rights can be a
powerful motivational factor.*

far greater willingness to compromise on Jerusalem among those in the second group than among those in the third group. Belief in the prospects for long-term peace would be a much more powerful motive for compromise than an acknowledgment of some legitimacy in the other side's claims. But in fact, it turns out that for these two groups, the willingness to compromise is virtually identical, across a wide variety of compromise proposals. Just as important, holding one or the other belief appears to make Israeli Jews in these groups significantly more open to compromise than those who hold neither belief. These data suggest that recognition of the other side's legitimate rights is a powerful motivational factor, quite possibly equal in strength to believing that achieving a peace treaty with the Palestinians will really lead to long-term peace.



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Does the realist view fare any better when Palestinian opinions are surveyed? According to one recent study, 70 percent of Palestinians support genuine peace with Israel, provided that there is a Palestinian state with East Jerusalem as its capital. The motivations here are

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some legitimacy.*

no doubt quite diverse—the realization that Israel is here to stay, the desire to see a Palestinian state come into existence, the desire to live normal lives. Recognition of Jewish rights is clearly not the dominant factor. Indeed, only a minority of this group (21 percent) recognizes some Jewish rights with respect to Jerusalem.

Yet it turns out that recognition of these rights does make some people more inclined to compromise on Jerusalem. For example, among Palestinians who favor peace with Israel, proposals for divided sovereignty over the Old City, or joint sovereignty over the entire city, receive twice as much support from those who recognize some Jewish rights than from those who do not. However, less forthcoming proposals,

such as giving Palestinians autonomy but not sovereignty over their neighborhoods, were thoroughly rejected by both groups.

One must be wary about reading too much into the data, but they do point to very interesting possibilities. First, regardless of whether or not people are opposed to compromise, it may be possible to get them to see that the other side does have some rights. Though not every Israeli or Palestinian will be brought to this point of view, an expanded moral discourse might well increase the number who grant the other side some legitimacy.

Second, the data suggest that if people arrive at such a recognition, it may indeed affect their willingness to compromise. Thus, in the effort to promote compromise on Jerusalem, it may make sense to engage right-wing Israelis in serious discourse with respect to Palestinian rights, and it may make sense to seriously engage the Palestinian mainstream in a parallel discourse with respect to Jewish rights.

What is Jerusalem?

Just as it may be worthwhile to draw people into the moral complexity of the question “Whose Jerusalem is it rightfully?” so too it may be worthwhile to wrestle with a second question: “What is Jerusalem?” To see why, one must understand a bit about the geography of the city.

For the moment, I mean by "Jerusalem" that territory lying within the municipal boundaries set by the Israeli government. Jerusalem consists of two parts, East and West. This distinction dates from the end of the 1948–49 Israeli war of independence, when the armistice line—known as the green line—divided the city into two sectors. In the eastern half was included

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the areas added to the city in 1967.*

the Old City—the one square kilometer of walled city that includes the Western Wall and the Temple Mount. During the 1948–67 period, Israel was cut off from East Jerusalem; the city was physically divided by barricades and barbed wire. Then, during the Six-Day War of 1967, Israeli forces "reunified" the city. Not only did they conquer East Jerusalem; they also routed the Jordanians and captured all of the West Bank. Within weeks of the reunification, Israel went on to expand Jerusalem. In particular, it redrew the municipal

boundaries to include within the city a large tract of land from the West Bank that had surrounded East Jerusalem. This "expanded East Jerusalem" was roughly ten times the size of what might be termed "Jordanian-controlled East Jerusalem." In drawing the new boundaries, the Israeli government sought to include as much land as possible, but as few Palestinians as possible. Thus the boundary lines were highly gerrymandered, weaving in, around, and sometimes through numerous Palestinian villages which lay near Jerusalem. These territories of expanded East Jerusalem are the only parts of the West Bank that the government has actually incorporated into Israel. And it is within this area that Israel launched a massive series of housing projects, creating large Jewish hilltop neighborhoods, referred to as "settlements" by the Palestinians.

Within East Jerusalem as a whole there are roughly equal numbers of Israelis and Palestinians. But almost all of the Israelis in East Jerusalem live within the areas added to the city in 1967; about half of the total 172,000 Palestinian residents of East Jerusalem also live within these areas. Within the Old City the population is approximately 90 percent Palestinian, and the urbanized areas of what had been Jordanian-controlled East

Working Papers on Civil Society

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The National Commission on Civic Renewal
3111 Van Munching Hall
University of Maryland
College Park, Maryland 20742

<http://www.puaf.umd.edu/civicronewal>

Report from the Institute for Philosophy & Public Policy

In relation to beliefs about whether a peace agreement with the Palestinians will lead to true long-term peace, and whether the Palestinians have any legitimate rights in regard to Jerusalem, the percentage of Israeli Jews who seriously consider and who flatly reject each proposal

		Groups				National Average
		I	II	III	IV	
Will a peace agreement lead to peace?		Yes	Yes	No	No	
Do Palestinians have any sort of legitimate rights with regard to Jerusalem?		Yes	No	Yes	No	
A. Substantial Support						
Palestinian sovereignty over Arab villages in East Jerusalem	Seriously Consider	79	47	52	27	45
	Flatly Reject	10	27	30	52	36
B. Moderate Support						
Autonomy for Arab areas in East Jerusalem	Seriously Consider	55	41	41	23	35
	Flatly Reject	22	38	36	56	44
Arab areas in East Jerusalem outside Old City to Palestinian sovereignty	Seriously Consider	53	37	39	19	34
	Flatly Reject	16	38	38	59	44
Joint administration of Old City without yielding on sovereignty	Seriously Consider	54	41	40	20	34
	Flatly Reject	22	33	36	55	41
Temple Mount under Wakf (Islamic Trust) as now	Seriously Consider	56	34	34	18	31
	Flatly Reject	23	44	40	62	48
C. Minimal Support						
Palestinian sovereignty over Arab neighborhoods in Old City	Seriously Consider	51	24	22	10	23
	Flatly Reject	24	52	45	70	55
Palestinian sovereignty over Temple Mount, Israeli over Western Wall	Seriously Consider	46	21	25	7	20
	Flatly Reject	33	56	55	71	58
Palestinian sovereignty over East Jerusalem, but Jewish neighborhoods given special status under Israeli control	Seriously Consider	38	23	20	9	19
	Flatly Reject	35	59	65	73	62
Old City internationalized under UN	Seriously Consider	34	26	18	10	18
	Flatly Reject	41	58	68	74	64
Percentage of the Total Population		21	12	18	49	100

Source: Jerome M. Segal, "Is Jerusalem Negotiable?" Center for International and Security Studies, University of Maryland, 1997.

Jerusalem (but not including the Old City) are almost entirely Palestinian.

In 1993 Israel again changed the boundaries, this time expanding West Jerusalem, and there are bills pending in the Knesset to expand East Jerusalem again as well, to include the large West Bank settlements of Maale Adumin and Givat Zeev, which lie a few kilometers outside the present boundaries.

In all this, what is Jerusalem? Meron Benvenisti, an Israeli expert on the city who was once deputy mayor of Jerusalem, described the halachic perspective (that is, the perspective of Jewish religious law) as follows:

Modern-day halacha follows in the wake of administrative decisions and extends the city's sanctity accordingly. All of the territory within its municipal boundaries is regarded as "the Holy City" by the religious establishment.

If this is the halachic point of view, it seems to have its secular analogue in the government's ability to extend the symbolic power of "Jerusalem" to any area that by administrative fiat gets called "Jerusalem." Thus, for

Even Palestinians, it often appears, construe as "Jerusalem" any area that Israeli authorities so identify.

instance, the recent Israeli decision to build a new Jewish neighborhood at Har Homa is presented by the government as a matter of principle: Israel's right to build anywhere within its capital, Jerusalem. Yet Har Homa had never been "inside" Jerusalem until it was scooped up in the 1967 expansion. (In fact, it is an isolated, rural hill on the outskirts of Bethlehem.) Even Palestinians, it often appears, construe as "Jerusalem" any area that Israeli authorities so identify. Thus the planned construction at Har Homa is characterized by the Palestinian leadership as "the Judaization of Jerusalem."

Does any of this make sense? How might a rational Israeli or Palestinian reflecting on his or her own attachment to Jerusalem determine the geographic content of that commitment?

Until the latter part of the nineteenth century, Jerusalem did not extend beyond the Old City. During almost all those centuries of Jewish diaspora in which there was prayer to and about Jerusalem, the city constituted an area comprising only 1 percent of what is presently Jerusalem. By what process can the object of attachment be so thoroughly transformed and yet retain its power to inspire loyalty and territorial claims?

Indeed, ancient Jerusalem cannot even be identified with the walled city. The current walls were built by the Ottoman rulers in the sixteenth century. The ancient city of David—the Jerusalem that the Bible

tells us was conquered by King David from the Jebusites—was not the Old City; it was a small area less than a quarter of the size of the Old City. Today, this area, mostly ignored, lies just south of the walled city. Even the Western Wall, for Jews the most revered site in Jerusalem, is often misunderstood. It was not a wall of the ancient Jewish Temple, but rather a retaining wall for the plateau on which the Temple stood. But archaeologists tell us that even this is not quite correct, because at the time of the ancient Temple, the plateau was much smaller than it is now. The Western Wall is a retaining wall for the plateau as it was expanded by King Herod in the first century BCE.

Even if one cares about Jerusalem, cares passionately, about exactly what should one care? In what should one reasonably invest one's concern? Assuming that Benvenisti is correct about halacha, can a rational person's emotional energies flow along that prescribed path—if the Knesset says that a settlement of 25,000 people a mile from Jerusalem is suddenly in the city, is it rational that one's feelings about that settlement suddenly change?

The more one wonders "What is Jerusalem?" the more perplexing it all becomes. Why, for instance, should Palestinians who deny that Israel has any rightful authority vis-à-vis Jerusalem or the West Bank experience "as Jerusalem" some village area in the

Even if one cares about Jerusalem, cares passionately, about exactly what should one care?

West Bank, simply because the day before, an Israeli administrative authority defined it as part of Jerusalem? We can understand why the political leadership on both sides might want to manipulate people's feelings about what is and is not Jerusalem. But, free from manipulation, what is Jerusalem, really?

Here again we find indeterminacy. One can know the facts, but the facts don't themselves imply that something is or is not Jerusalem. To view something as Jerusalem is to have made a *decision*, or to have adopted a stance or a point of view. And such a decision can be reversed, when there are good reasons to do so.

Redefining Jerusalem

The empirical research suggests that official boundaries, halachic positions, and political rhetoric aside, we should go slowly in making any assumptions with respect to how ordinary Israelis or Palestinians define Jerusalem. It turns out that there is actually great diversity within each national community in the extent

to which different parts of what is administratively defined as Jerusalem by Israel are invested with the symbolic power of Jerusalem. And there is considerable willingness, if there are good reasons, to redefine Jerusalem. For example, when Israeli Jews were asked,

"In order to insure a Jewish majority [in Jerusalem] would you support or object to redefining the city limits so that Arab settlements and villages which are now within the borders of Jerusalem (such as Shuafat, Um Tuba, Sur Bahir) will be outside the city?"

59 percent supported and 41 percent opposed this redefinition of the boundaries. Moreover, of the 41 percent opposed, only 7 percent were strongly opposed. Presumably, anyone who views the boundaries of the

*What is not at the moment
politically viable could over time
emerge as the basis for lasting peace.*

city as a sacred line would have been very opposed. Thus, we can conclude that almost no Israeli Jews view the boundaries in this way. For purposes deemed legitimate, what is Jerusalem, especially what is East Jerusalem, can be expanded or diminished. Within limits, boundaries are a policy instrument.

When Palestinians were asked if they considered as part of Jerusalem those areas that were defined as Jerusalem for the first time when Israel expanded the boundaries in 1967, roughly 40 percent said they did not and 60 percent said that they did. The result varies, however, depending on whether the question emphasizes that Israel made this specification. When simply asked about the areas by name, more people view them as part of Jerusalem. What this suggests is that calling attention to the fact that common definitions of Jerusalem implicitly accept Israel as the party who defines "Jerusalem" prompts Palestinians to assert their own definitions.

On both sides, moreover, there are major differences in the extent to which people consider various parts of the city "important as part of Jerusalem." Within each national community, one finds consensus around certain areas—for instance, around the Western Wall for Israeli Jews, and around the Haram al-Sharif (the Temple Mount) for Palestinians. But then, within each national community, this consensus breaks down. Only about a third of Israeli Jews view Palestinian residential areas anywhere in the city, including those within the Old City, as "very important as Jerusalem." And only about a quarter of Palestinians view Jewish residential areas within any part of the city as "very important as Jerusalem." It turns out that once one disaggregates the Old City, only two areas in all of Jerusalem stand out as

of great importance to most Palestinians *and* to most Israelis "as part of Jerusalem": the Temple Mount and the Mount of Olives.

All of this suggests that exploring what actual people experience as Jerusalem holds much promise as a key to resolving the conflict. Broadly speaking, it is possible for Israeli Jews to experience "Yerushalayim" as consisting of the Old City plus Jewish residential and commercial areas in East and West Jerusalem, and it is possible for Palestinians to experience "Al Quds" as consisting of the Old City plus Palestinian residential and commercial areas in East Jerusalem.

When we bring together the "What is Jerusalem?" question with the "Whose is It?" question, what emerges is a path towards conflict resolution. This path leads, as it were, to two overlapping Jerusalems that have only the Old City and the Mount of Olives in common and over which there would be some form of joint administration. Were national referenda held on this approach today, it would attract greater support than most people believe. Even so, the extent and intensity of popular opposition would preclude an agreement. It is reasonable to believe, however, that if there emerged on both sides a political leadership that sought to achieve an agreement on Jerusalem, and if there were a much fuller discourse about the moral complexity of the Jerusalem question, what is not at the moment politically viable could over time emerge as the basis for lasting peace.

—Jerome M. Segal

Sources of data on Israeli and Palestinian attitudes: Elihu Katz, Shlomit Levy, and Jerome M. Segal, "The Status of Jerusalem in the Eyes of Israeli Jews," Center for International and Security Studies, University of Maryland, 1997; Nader Said and Jerome M. Segal, "The Status of Jerusalem in the Eyes of Palestinians," Center for International and Security Studies, University of Maryland, 1997; Jerome M. Segal, "Is Jerusalem Negotiable?" Center for International and Security Studies, University of Maryland, 1997. The study of Israeli attitudes was funded primarily by the Ford Foundation and the United States Institute of Peace. The study of Palestinian attitudes was funded by the MacArthur Foundation.



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STAFF:

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David A. Crocker, Research Scholar
Robert K. Fullinwider, Research Scholar
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